

1 A P P E A R A N C E S:

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P R O C E E D I N G S

THE CLERK: Court calls Civil Action 18-11963, Sterling Suffolk Racecourse v. Wynn Resorts, et al. Could counsel please identify themselves.

MR. STORCH: For the plaintiff, Steven Storch of Storch Amini.

MR. BREWER: John Brewer of Storch Amini.

MS. BERNSTEIN: Inga Bernstein of Zalkind, Duncan & Bernstein.

MR. RUSSCOL: David Russcol, Zalkind, Duncan & Bernstein.

MR. BIAGETTI: And for defendants, Wynn Resorts, Wynn Mass., and Matthew Maddox, Peter Biagetti.

MR. KETE: For the same defendants, David Kete.

MR. KATZ: Good morning, your Honor. Aaron Katz for FBT Everett Realty, LLC. Chris Weld from Todd & Weld is also here on behalf of FBT.

MR. KRAMER: Good morning, your Honor. James Kramer from Orrick, Herrington & Sutcliffe on behalf of Kim Sinatra.

THE COURT: Thank you.

MR. KELLY: Good morning, your Honor. Brian Kelly on behalf of Mr. Steve Wynn.

MR. SHARP: Josh Sharp on behalf of Steve Wynn. Good morning.

1 THE COURT: All right, thank you. You may be
2 seated.

3 I am using this courtroom because my courtroom is
4 undergoing renovations, but unfortunately the acoustics are
5 absolutely terrible, so you need to speak up as you're
6 addressing me. I know you've got a sequence that's already
7 been prepared, but I want to make it clear. For each point,
8 will the plaintiff have someone designated to deal with it
9 so it's not all at once?

10 MS. BERNSTEIN: We will.

11 THE COURT: I think that's more helpful to me.
12 And we'll break if we're not done at 11:00 for 15, 20
13 minutes.

14 All right, Mr. Biagetti.

15 MR. BIAGETTI: Thank you, your Honor. Again, I'm
16 Peter Biagetti for Wynn Resorts, Wynn Massachusetts, and
17 Matt Maddox. Pursuant to the sequence that we provided, I
18 will speak first to three what we believe are irreparable
19 deficiencies in the RICO claims: a lack of a pattern,
20 belatedness under the statute of limitations, and the lack
21 of standing and proximate cause. These all arise, as you
22 know, Judge, out of a challenge to the award of the casino
23 license to Wynn Massachusetts and not to, among others,
24 Mohegan Sun. That challenge is currently the subject, has
25 been, of scrutiny by a state agency, the Massachusetts

1 Gaming Commission. It is the subject of a pending civil
2 challenge by the losing applicant, Mohegan Sun, via
3 certiorari review.

4 THE COURT: What is the status of the state court
5 litigation?

6 MR. BIAGETTI: That litigation is pending. It's
7 been on hold pending what was happening at the Gaming
8 Commission but is very much alive.

9 THE COURT: So, as I understand it, the Gaming
10 Commission made a decision within the last week or so.

11 MR. BIAGETTI: Last week, yes.

12 THE COURT: So does that reopen the state court
13 proceeding?

14 MR. BIAGETTI: I believe it had been on hold, and
15 now it continues, yes.

16 THE COURT: And that's a challenge by Mohegan? Is
17 that it?

18 MR. BIAGETTI: Mohegan among others, yes, to the
19 process itself.

20 THE COURT: Is it raising -- none of you talked
21 too much about this. Is it raising the same kinds of
22 claims?

23 MR. BIAGETTI: It is, Judge. I will get to it
24 when we talk about standing.

25 THE COURT: All right. It's not so much standing

1 as much as whether or not I should defer until I let the
2 state court do its -- so, in other words, if Mohegan won, I
3 might go down one path, and if Mohegan lost, I might go down
4 another.

5 MR. BIAGETTI: True, but even more immediately, in
6 our view, respectfully, the fact that there are two other
7 incentivized challengers to the process and the result --
8 namely, the Gaming Commission, which has now continuing
9 authority, and Mohegan, which as the losing applicant has
10 this petition under way -- the Supreme Court cases make
11 clear that the availability of those other challenges is
12 something you should take into account when you review the
13 fact that the injury that they have alleged, the plaintiff
14 has alleged, is too attenuated.

15 THE COURT: Let me ask you this: Who's the judge
16 in the state court who has it?

17 MR. BIAGETTI: It's in the BLS. I don't know who
18 the judge is.

19 THE COURT: We don't know who the judge is?

20 MR. WELD: I'm just told by Mr. Starr that it's
21 Judge Sanders, so I believe that's the BLS, so it would be
22 Judge Sanders or Salinger. They rotate.

23 THE COURT: Thank you. All right.

24 MR. BIAGETTI: So state agency scrutiny, state
25 court litigation and review. And we believe that it is not,

1 on the facts alleged, the stuff of a federal RICO claim,
2 particularly when, as I just alluded to, the purported
3 plaintiff is a would-be vendor to a would-be winner, had
4 Wynn itself not prevailed.

5 I'm going to start with these three deficiencies,
6 Judge, because they are not simply with regard to what
7 Sterling has not alleged. They are with regard to what
8 Sterling cannot state with regard to RICO on the facts
9 alleged.

10 THE COURT: All right, let's get to them. All
11 right, so the first one is?

12 MR. BIAGETTI: Pattern.

13 THE COURT: Pattern.

14 MR. BIAGETTI: Right, and I've provided a handout
15 as well as at least one excerpt, your Honor, from
16 Paragraph 8. All you have to do is get to Page 5.

17 (Discussion off the record.)

18 MR. BIAGETTI: If you look at just the preamble to
19 Paragraph 8, your Honor, it's really as far, respectfully,
20 as you need to go. The complaint according to Sterling
21 arises out of a series of unlawful acts that allegedly were
22 perpetrated, quote, "in order to unlawfully acquire the
23 gaming license," one license in one process which is
24 completed, finite; there will not be another process; there
25 will not be another license; one victim immediately, the

1 MGC, and one loser, Mohegan. It's the quintessence, Judge,
2 of what you recognize, and so many other courts in the First
3 Circuit have, of a finite, closed-ended, single-purpose,
4 unitary scheme, just one. And it's completed, it's done;
5 and so, therefore, no matter how many acts, episodes,
6 subparts were supposedly perpetrated within that scheme, its
7 single purpose and unitariness dooms it as a matter of law.

8 THE COURT: I don't think the courts have gone
9 that far.

10 MR. BIAGETTI: Well, let me do two things briefly.

11 THE COURT: I mean, you're right that they're
12 viewed more with askance when it's single purpose; but if
13 you have a large pattern of fraudulent acts, even for a
14 single purpose, it doesn't -- the court needs to examine it.

15 MR. BIAGETTI: Okay, fair enough, but what I'd
16 like to do is take you through briefly the pattern that's
17 alleged in the two RICO counts and then talk about a couple
18 of those cases. So I have a handout that I provided to you
19 just to help do that. The first --

20 THE COURT: It's a 21-month, single-purpose
21 alleged conspiracy, right?

22 MR. BIAGETTI: Yes, that's right. The alleged
23 scheme here in the first claim, you're right, is that there
24 were fraudulent and omissive statements submitted to the
25 Commission from, according to the plaintiff, January, 2013,

1 through September, 2014. Now, we don't think September,
2 '14, is the well-pleaded endpoint because that is when the
3 straw vote was taken on the award of the license, the
4 so-called "Phase 2" inquiry. The determination that was
5 allegedly extracted by fraud is the suitability, the
6 threshold --

7 THE COURT: I don't want to jump to that. That's
8 a harder argument for you. I want to just deal with the
9 pattern, which I'm struggling with. All right.

10 MR. BIAGETTI: All right, but indulge it as
11 whatever that is, 17 months, you still have, when you look
12 at the scheme alleged in the first count, essentially four
13 fraudulent submissions. And you can see about halfway down
14 here we've given you the allegation, and then we've given
15 you the actual paragraphs in which the dates of those
16 omissive statements and submissions allegedly occurred:
17 January of '13, July of '13, and December of '13. You've
18 got eleven months, and you've got four submissions. That's
19 it.

20 Now, there is an allegation of causing Mayor
21 DeMaria to abuse his powers. If you look closely at the
22 paragraphs that we've mentioned, it's hard to fix when they
23 claim this happened. We believe it is at some unspecified
24 time between October, '09, and again the December, 2013 vote
25 on suitability, but the pattern ends there because that's

1 when the determination is allegedly fraudulently extracted.

2 And then, finally, there's an allegation of Travel
3 Act violations to Massachusetts; but when you look closely,
4 those are simply to obtain the information needed and the
5 alleged assents for those fraudulent submissions. So in its
6 essence, as specifically pleaded, four submissions and the
7 acts leading up to them all in January through December,
8 2013.

9 Now, we challenged that. You recall here, Judge,
10 that we've already gone through an original complaint and a
11 motion to dismiss. We challenged. We --

12 THE COURT: But I didn't read that. We put that
13 aside. I didn't even read it.

14 MR. BIAGETTI: Absolutely, absolutely. But on the
15 amendment, in the 59 or so paragraphs that got added, what
16 the plaintiff did was add this notion of concealment. It
17 was an attempt to breathe continuity into a finite,
18 completed scheme. And that's the second --

19 THE COURT: Can we just go through, because I
20 think this is important --

21 MR. BIAGETTI: Sure, please.

22 THE COURT: -- the alleged fraudulent
23 submissions --

24 MR. BIAGETTI: Yes.

25 THE COURT: -- and whether or not they state a

1 claim. Some of the alleged fraudulent submissions had to do
2 with the property --

3 MR. BIAGETTI: Correct.

4 THE COURT: -- and whether or not it was
5 mob-related.

6 MR. BIAGETTI: Correct.

7 THE COURT: All right, so are you challenging
8 whether or not those were fraudulent statements?

9 MR. BIAGETTI: Sure, yes.

10 THE COURT: Okay, so let's talk about that.

11 MR. BIAGETTI: Yes. And, again, I think my
12 brothers can talk about the underlying predicate acts, but
13 to --

14 THE COURT: Oh, I see, I see, I see. All right.

15 MR. BIAGETTI: -- put it succinctly, we believe
16 that the allegedly concealed ownerships were, in the
17 plaintiff's words, matters of public record, in the Boston
18 Business Journal, in the Globe, in the Gaming Commission's
19 investigatory report, and even addressed by the Gaming
20 Commission when it made its ruling in December.

21 THE COURT: All right, so that raises a separate
22 set of issues, but what makes this case a little bit unusual
23 is that there are conceded lies. That often doesn't happen,
24 I mean, right, about the property and about the sexual
25 activity? So what you're saying is, "But the Gaming

1 Commission knew it anyway." That's the basic defense that
2 you're -- well, because there were misrepresentations,
3 right?

4 MR. BIAGETTI: With regard to the underlying
5 predicate acts, yes. But the argument that I'm focused on
6 right now is, even if you indulge that as true, that there
7 was concealment, fraudulent and omissive statements to the
8 Gaming Commission, those happened in eleven months.

9 THE COURT: Okay, so just we'll narrow this down.
10 There's a concession that there's sufficiently stated facts
11 for fraudulent concealment before the Gaming Commission, but
12 you're saying that it wasn't over a long enough span of time
13 to constitute a threat, a threat of contin- -- well, no,
14 those are two different issues.

15 MR. BIAGETTI: Continuity, no continuity.

16 THE COURT: Because you could argue there's a
17 pattern, right, because there's at least two of them?

18 MR. BIAGETTI: Sure.

19 THE COURT: Okay, so there's a pattern of,
20 concededly, fraudulent statements.

21 MR. BIAGETTI: There are multiple related acts.

22 THE COURT: Right, there are at least two of them.

23 MR. BIAGETTI: But they are aimed at a single
24 goal.

25 THE COURT: Okay, I get it. All right, so I'm

1 trying to see what's conceded. There are at least two,
2 which is all the statute requires, fraudulent concealments,
3 broadly as the ownership of the FBT property and the sexual
4 cover-ups, if you will, in Nevada. And what you're saying
5 is, "But that was over too brief a period of time." So
6 that's all the statute requires is two.

7 MR. BIAGETTI: Uh-huh.

8 THE COURT: Right? I've got that right?

9 MR. BIAGETTI: Yes, if there were --

10 THE COURT: So now the question is, there are at
11 least two in a brief period of time. You could talk about
12 whether it's nine months, or what was the other one, 21
13 months? I'll have to hear about that. But, anyway, and
14 what you're saying is, it's closed-ended because it was
15 single purpose and doesn't threaten a continuity. So it's
16 not about a pattern. That would be wrong because there are
17 at least two.

18 MR. BIAGETTI: Well, yes, but the continuity is
19 more than two acts. There are plenty of cases --

20 THE COURT: I understand. The statute requires
21 two for there to be a pattern. You're talking about --

22 MR. BIAGETTI: The statute requires at least two.

23 THE COURT: There are two.

24 MR. BIAGETTI: Yes.

25 THE COURT: Okay, so now the question is whether

1 that's enough.

2 MR. BIAGETTI: Yes.

3 THE COURT: Okay.

4 MR. BIAGETTI: Okay. And, again, I'm going to
5 save for my brothers out of efficiency the deficiencies with
6 regard to predicate acts, but for purposes of the pattern
7 argument, even if you had four false or fraudulently
8 omissive statements, you wouldn't have enough here because
9 you wouldn't have that continuity. As the First Circuit
10 said in *Efron*, even where there are multiple related acts,
11 when they're all aimed at a single goal and had a finite
12 nature, they do not constitute sufficient continuity for a
13 pattern. "A plaintiff must show
14 a realistic prospect of continuity over an open-ended period
15 yet to come." That's the *Home Orthopedics* case, and we
16 simply don't have that here. The best illustrations, your
17 Honor -- and the same is true with regard to the second
18 claim, the second RICO claim.

19 THE COURT: The first one was false statements
20 about the mob and the backdated documents and that sort of
21 thing.

22 MR. BIAGETTI: That's right.

23 THE COURT: The second one had to do with the
24 Mayor.

25 MR. BIAGETTI: Yes, okay, so even if the

1 allegation with regard to the Mayor -- and, again, you can't
2 tell when it is that he supposedly was offered some phantom
3 stake and when he supposedly acted on that. The only
4 allegation is that there's an unrelated intervention by him
5 with regard to an abutting tenant in 2016, so we don't think
6 that would even be related.

7 THE COURT: Did the Gaming Commission know about
8 the allegations involving the Mayor?

9 MR. BIAGETTI: Involving the Mayor, at the time of
10 the --

11 THE COURT: Grant of the license?

12 MR. BIAGETTI: I don't believe so.

13 THE COURT: So now they know when they just
14 recently recommitted to the license.

15 MR. BIAGETTI: Yes, yes.

16 THE COURT: Was that examined by the Gaming Commission?

17 MR. BIAGETTI: Was that addressed?

18 THE COURT: Yes.

19 MR. BIAGETTI: No.

20 THE COURT: The allegations about the Mayor and
21 the side deal with the Mayor?

22 MR. BIAGETTI: I don't believe so.

23 THE COURT: Did the Gaming Commission address the
24 backdated documents?

25 MR. BIAGETTI: Well, the Commission has addressed

1 all of the issues regarding the alleged concealment of the
2 ownership of felons, including the documents they submitted,
3 sure, and they have decided as recently as last week not to
4 change any of their decisions.

5 THE COURT: Yes, instead to impose this big fine.

6 MR. BIAGETTI: Right. So just to finish up on
7 pattern, because there is a second claim which the
8 plaintiffs have made on amendment, and this one says that
9 certain of the defendants operated Wynn Massachusetts as an
10 enterprise.

11 THE COURT: Oh, yes.

12 MR. BIAGETTI: Okay? But the purpose, supposedly,
13 of that enterprise, as you can see in our first blurb here,
14 the alleged enterprise's purpose was applying for a
15 Category 1 gaming license. And the alleged acts are -- we
16 listed them again, but they're basically all those false
17 statements again; and now we have these allegations of
18 concealment, concealment of what went on years prior,
19 allegedly, in Macau and Nevada, including the sexual
20 misconduct allegations, and then an allegation that somehow
21 after the award of the license, that there has been some
22 sort of continuing concealment. No affirmative acts of such
23 concealment alleged, but just the flavor of it, again, in
24 our view, is an attempt to add continuity.

25 THE COURT: Which paragraph are you talking about?

1 You're talking about the Travel Act allegations with respect
2 to the enterprise, right?

3 MR. BIAGETTI: The Travel Act, yes.

4 THE COURT: So what are you saying, that that's
5 not enough? I think they're claiming that's part of the
6 pattern.

7 MR. BIAGETTI: That's not enough. Sure, certainly
8 it's part of the alleged pattern. They haven't sufficiently
9 pleaded Travel Act violations, my brother will address, but
10 even if they did, the purpose of the traveling was to obtain
11 the false or fraudulently omissive statements that were
12 submitted in eleven months toward a single goal.

13 So the last point on pattern is this, and it's the
14 next page, 3. We'll just summarize for your Honor points
15 that are made in the briefs with regard to your very good
16 point, which is, when does a plaintiff allege more than two
17 acts, and even allege concealment, but still not breathe
18 continuity into that finite scheme? *Apparel Art* is the best
19 example, Justice Breyer when he talks about several false
20 statements including a cover-up. There it was 13 months of
21 acts, but he says, "Taken together, they comprise a single
22 effort to obtain and to keep one contract. And "to keep" is
23 important language because you're going to hear plaintiff's
24 counsel say, "Well, gee, they may have gotten suitability
25 determination in December of '13, but the only way they kept

1 it was this continuing failure to disclose." It's simply
2 not enough. As Justice Breyer said, eventually lying about
3 fraudulent participation is not enough to breathe
4 continuity.

5 A couple of other cases here, but the two by you
6 two years after *Apparel Art* are really the most instructive,
7 in my view. In *Boden Construction*, the one we've got in the
8 middle of the page, to remind you, Judge, there were
9 allegations of --

10 THE COURT: The year I became a judge, not to date
11 myself.

12 MR. BIAGETTI: It's a comprehensive, apt, and
13 illustrative opinion, 103 acts of mail and wire fraud in
14 that case; but you correctly found that all the alleged acts
15 revolve around the perpetration and concealment of an
16 allegedly fraudulent arrangement for the renovation of the
17 Sea Crest Hotel. The coverup there lasted 18 months, and so
18 you undertook the analysis, you went beyond the two acts,
19 and you found there, as we would say here, that there's only
20 a single-purpose scheme, not enough to allege a pattern.
21 And because it's now happened on amendment -- in fact, on
22 the amendment, besides adding 56 paragraphs, they scrapped
23 two RICO theories, they added this new one, the Wynn Mass.,
24 and they still can't get there, respectfully. Why? Because
25 these are irreparable flaws. These are flaws that cannot

1 be --

2 THE COURT: Well, what about the argument that
3 they were engaged in crooked or slimy, or whatever word you
4 want to use, deals in Macau, so it predated this conspiracy
5 and therefore is likely to postdate it?

6 MR. BIAGETTI: This is what's important about
7 that, though, your Honor.

8 THE COURT: They're not claiming those are RICO
9 acts. They're just claiming there's a long-term, I don't
10 know, course of conduct, if you will.

11 MR. BIAGETTI: If you look at the words, both of
12 the two counts and even conceded in the opposition, they're
13 saying that it's not so much that the behavior in Macau and
14 Nevada is an act; it's that the concealment of those
15 behaviors in the fraudulent and omissive statements that
16 were submitted over eleven months is somehow part of the
17 pattern. And that's why we are saying that even if there is
18 such concealment during that short period of time, adding
19 that layer, that air of concealment does not breathe
20 continuity into it. All right?

21 THE COURT: Okay, we need to move on a little bit
22 because we'll be here for the entire week.

23 MR. BIAGETTI: Okay, I'm finished on Paragraph --
24 I have two more irreparable deficiencies, but I hope that
25 your Honor will hear me on those in a moment. Thank you.

1 THE COURT: All right, who's --

2 MR. STORCH: Your Honor, first of all, the
3 selected excerpts from the --

4 THE COURT: Now, first of all, you're too
5 soft-spoken, so you need to belt it out because this mic is
6 terrible.

7 MR. STORCH: It will take me a while to modulate
8 my voice.

9 THE COURT: You're Mr. Storch?

10 MR. STORCH: Yes, I am.

11 THE COURT: And where are you from?

12 MR. STORCH: New York City.

13 THE COURT: All right, I've heard of it, yes.

14 (Laughter.)

15 MR. STORCH: East Side, you know, towards the
16 river.

17 THE COURT: All right, that's fine.

18 MR. STORCH: So, your Honor, first, on this notion
19 that it's an eleven-month span of time, my brother leaves
20 out allegations in Paragraphs 137, 138, and 120 of the
21 complaint --

22 THE COURT: 137 --

23 MR. STORCH: -- 137, 138, and 120 of the complaint
24 which indicate fraudulent representations in June of 2014
25 and August of 2014.

1 THE COURT: Can I get there for a minute.

2 So 137, 138, and 120, is that it?

3 MR. STORCH: Yes, your Honor.

4 THE COURT: All right.

5 MR. STORCH: With respect to this notion that this
6 is just a one-off, one-object scheme, the cases, first of
7 all, don't say that if there's one scheme, one object, that
8 that necessarily is the death knell for a RICO claim. I
9 think a key distinguishing factor in those cases is that the
10 court looked at them and said, you know, this has the feel
11 of a garden- variety type of business dispute. These are,
12 with respect to the hotel in your Honor's case, two factions
13 that are arguing over a hotel. It doesn't have any broader
14 import. There are not likely any broader victims.

15 Here we have a situation where just in the last
16 week, not only was there the fine, which I understand is the
17 largest in the history of the gaming industry in the United
18 States, tacked on with the Nevada fine of some \$55 million,
19 but the Commission went out of its way to say that they're
20 not sure that this company can be trusted.

21 THE COURT: Where does it say that?

22 MR. STORCH: When they put in a monitor because
23 they --

24 THE COURT: See, I don't know these things. Did
25 somebody submit their opinion for the record?

1 MR. STORCH: Yes, we did, your Honor, last week.
2 I think it was on Thursday, if I'm not mistaken.

3 THE COURT: All right.

4 MR. STORCH: The Commission actually imposed a
5 monitor for the next five years, gave the Wynn defendants
6 the opportunity to come in after three years and seek to
7 have it lifted. Now, the reason you put a monitor in is
8 because you're worried that something else might happen,
9 that you don't fully trust that entity to operate. So I
10 think that's something that shows that there is the threat
11 that this company could engage in continuing activities.

12 There's something else in that decision from the
13 Commission last week. They go out of their way to point out
14 that Mr. Maddox, the CEO, while the Commission investigation
15 was going on, had people surveil the witnesses that the
16 Commission was interviewing. The Commission went out of its
17 way criticizing Mr. Maddox for doing that and saying that it
18 could -- and if I can just quickly find the words of the
19 Commission -- "Mr. Maddox's authorization of the operation
20 was careless and exposed the investigation to risk by
21 shaking the trust of critical witnesses who were in the
22 process of being interviewed."

23 This is an organization, your Honor, that
24 conceals; when it's caught, it attacks; and when it finally
25 has no alternative, selectively releases facts. It doesn't

1 come clean. It still to this day has not come clean with
2 the Commission. Mr. Maddox --

3 THE COURT: Well, how much did the Commission --
4 you've made certain allegations about the mob and the mob
5 owning the property and backdating documents and
6 relationships with the Mayor, et cetera. How much did the
7 Commission know about all that?

8 MR. STORCH: The Commission knew that there was a
9 question as to whether or not Mr. Lightbody and Mr. DeCicco
10 still had an interest, and when, if their interest was
11 actually transferred, it was transferred. The Commission
12 took testimony, asked for information as to what the status
13 of these individuals were. Particularly with respect to
14 Mr. Lightbody, they were told that Mr. Lightbody was out.
15 Mr. Maddox had testified before the Commission, says
16 Mr. Lightbody has no relationship any longer with either
17 Wynn or FBT.

18 What Mr. Maddox didn't say, and as we allege in
19 the complaint is, just some two months earlier he had met
20 with Mr. Lightbody, who was helping him to acquire a piece
21 of property that Wynn needed in order to complete its casino
22 project. What he didn't tell the Commission was that he was
23 emailing with people at FBT seeking their help to get that
24 parcel of property.

25 THE COURT: Did they know about this alleged side

1 deal with Russo, who was a consultant for the Mayor, and the
2 allegation that it was money that was going to be going into
3 the Mayor's pocket?

4 MR. STORCH: Not to my knowledge, your Honor.

5 THE COURT: That was not part of the
6 investigation?

7 MR. STORCH: I have not seen that being part of
8 any investigation. That was an allegation that we have in
9 our complaint and that I think first materialized when we
10 filed our complaint.

11 THE COURT: I didn't hear you. Materialized when?

12 MR. STORCH: When we filed our amended complaint
13 in this action.

14 So in terms of just the closed-end aspect of it,
15 our complaint sets forth a 21-month period. As *Efron* said,
16 the First Circuit case, *Efron* said 21 months is actually
17 okay under the Supreme Court precedence. It means, though,
18 for 21 months, we want to see something more. We don't want
19 to just see, hey, the number of predicate acts and it's 21
20 months. Let's see something more.

21 The "something more," your Honor, is what we are
22 seeing even last week. This is a company that it cannot be
23 said is not a risk to commit more of these defalcations; and
24 certainly, while maybe there's less of a risk today because
25 there's a monitor watching them, before that monitor was put

1 in, obviously the Commission thought there was certainly a
2 risk of some ongoing misbehavior. So for those reasons,
3 your Honor, we believe that the --

4 THE COURT: I'm going to find allegations with
5 respect to continuity in Paragraphs 137, 138, and 120?
6 Those are your core --

7 MR. STORCH: Well, those are the ones that stretch
8 it out beyond, your Honor.

9 THE COURT: Beyond?

10 MR. STORCH: Beyond the eleven months that I was
11 responding to.

12 THE COURT: Oh, but not beyond the 21 months that
13 you're asserting?

14 MR. STORCH: Right, correct. But our complaint
15 has numerous other allegations of fraudulent conduct
16 starting in November of 2012 and going throughout the time
17 period 2012 up until the time of the license.

18 THE COURT: Is there anything that goes beyond the
19 2014, 9/2014?

20 MR. STORCH: Well, your Honor, there is this
21 issue: We have alleged in our complaint about the Mayor
22 being on the payroll. We do allege in our complaint that in
23 2016, that --

24 THE COURT: Well, you didn't allege he was on the
25 payroll. You alleged --

1 MR. STORCH: We alleged that he was getting a
2 piece of --

3 THE COURT: That he was getting some of the
4 proceeds from the real estate transaction, right?

5 MR. STORCH: That's correct.

6 THE COURT: Through Mr. Russo?

7 MR. STORCH: That's correct. And what we do
8 allege in the complaint is that in 2016, that the Wynn
9 people were again having a problem of getting another parcel
10 of land that they needed for the casino site, and that they
11 attempted to get the tenant to leave. He refused to leave.
12 They went to the Mayor's office, and then shortly thereafter
13 somebody from the Building Department showed up and
14 basically listed all these violations that this person had,
15 even though just a few months earlier they had come and
16 found it completely clean.

17 THE COURT: So you're saying that's evidence of
18 continuity? Is that why that's relevant, in your view?

19 MR. STORCH: Yes, that's right, your Honor. And
20 there is a lawsuit pending on that with the -- that
21 individual and his business are suing claiming, "Look, this
22 is part of a conspiracy to throw me out between Wynn and the
23 Mayor's office."

24 THE COURT: And that's in State Court?

25 MR. STORCH: That's in State Court, your Honor.

1 THE COURT: Superior?

2 MR. STORCH: I believe it's in Superior Court.

3 THE COURT: All right, thank you.

4 MR. STORCH: Thank you.

5 THE COURT: All right, so, now, you have --

6 MR. BIAGETTI: Your Honor, I wanted to make --

7 THE COURT: -- standing and proximate cause.

8 MR. BIAGETTI: Yes. I wanted to make one point
9 about statute of limitations, and then end by focusing on
10 proximate cause, and then sit. Will that work?

11 THE COURT: Yes. This case probably won't go away
12 on statute of limitations.

13 MR. BIAGETTI: Because your Honor asked a couple
14 of questions about what was known, and so I just wanted to
15 make clear very quickly what our statute of limitations
16 argument is, and this is Page --

17 THE COURT: You know, you've briefed this all to
18 death, and I'm --

19 MR. BIAGETTI: Yes, just very briefly,
20 respectfully, what we're basically saying there in the
21 statute of limitations argument is, the suitability
22 determination happens in December of '13. You add four
23 years to that, you get to December of '17, and this case is
24 filed nine months later in September of '18. So by
25 September of -- what we're saying is that the injury accrued

1 and the acts were known or knowable at the time of that
2 suitability determination.

3 THE COURT: Yes, you briefed it that way.

4 MR. BIAGETTI: Yes, it's that simple, and it's
5 based on what the MGC --

6 THE COURT: I don't see why you know your harm
7 until the other side gets it. I mean, I see your argument.
8 It's not crazy. It's just you don't know of your injury
9 till you've lost the contract.

10 MR. BIAGETTI: Well, suitability, though -- they
11 don't even have the opportunity -- look at it this way,
12 respectfully: They don't even have the opportunity to be
13 injured by anything in the Phase 2 process if they haven't
14 already been allegedly injured by the threshold
15 determination. That's the date when the clock starts
16 ticking.

17 THE COURT: I get it. Just it's unlikely to go
18 away on statute of limitations. Okay, so --

19 MR. BIAGETTI: Let me talk about standing and --

20 THE COURT: Because I'm more concerned about
21 whether this states a RICO claim.

22 MR. BIAGETTI: Okay, all right.

23 THE COURT: So we have a single-purpose conspiracy
24 to get a license, and there's enough probably alleged --
25 there are more than two acts, so that's enough for a

1 pattern, and your argument is that there's not enough to
2 show continuity. So, now, that's been fully vetted here.
3 We've argued that. So you're moving on now to standing,
4 right?

5 MR. BIAGETTI: Yes, standing and proximate cause,
6 and then I'll sit. And, by the way, even if --

7 THE COURT: You know, I don't have all morning, so
8 standing.

9 MR. BIAGETTI: Here we go. The standing and
10 proximate cause argument, again, I set out the barebones of
11 what they've alleged in the handout at Page 6, your Honor,
12 which makes clear, first of all, what they're alleging,
13 okay, which is that they were fraudulently deprived of
14 benefits by Wynn all via deceiving the non-members of the
15 Gaming Commission. So they're saying that the deception of
16 the Commission somehow is the proximate cause of their
17 injury. And under the cases, we quoted *George Lussier*, but
18 it's clear from so many that a RICO plaintiff can't simply
19 point to something and say it's a cause; it must be the
20 proximate cause, and you can't get there here for three
21 reasons. There are three independent factors which, in our
22 view, break the cause in a chain.

23 Briefly, the first one is agency action in its
24 discretion with regard to who gets the license. Here,
25 Mohegan was the only other applicant in Phase 2. But

1 Phase 2, after the suitability determination, which we say
2 is, you know, and which they claim is the critical, you
3 know, extraction of a fraudulent benefit, by Phase 2, the
4 factors that the Commission is considering include finances,
5 economic development, building and site design, mitigation,
6 stuff that has nothing to do, respectfully, your Honor, with
7 suitability. There is no way to say that had Wynn Mass.
8 been eliminated as unsuitable, that Mohegan would have been
9 selected. In fact the statute, and we quote it here, gives
10 the Commission the discretion to award a contract to no one
11 at all, or to, for example, invite more bids, or to require
12 a fix. It's exactly what they did with regard to the
13 allegedly concealed ownership: They required those
14 certifications.

15 And as for, you know, looking back in terms of
16 what happened --

17 THE COURT: But on a, what would you say, on a
18 motion to dismiss level, I don't know that I can decide
19 whether or not --

20 MR. BIAGETTI: Oh, I think if you look --

21 THE COURT: I don't even know. What's Mohegan?
22 Was there an issue with them? I haven't followed this whole
23 thing, okay? So what was the issue with Mohegan? Was there
24 an issue with Mohegan? Did they have finance or economic
25 issues?

1 MR. BIAGETTI: No. What the Commission did --
2 and, first of all, we offered it as an exhibit to our motion
3 to dismiss, which we believe you may rightfully entertain
4 because the decision is referenced in the complaint, and the
5 decision is agency action of which you may take judicial
6 notice. And if you look at it, it's about five pages of a
7 chart, and what the Commission does is criterion by
8 criterion. They have a column for Wynn and they have a
9 column for Mohegan, and they take that gestalt of criteria,
10 and they ultimately make a decision.

11 THE COURT: Yes, they decide your guy is better,
12 but there was no knock-out punch with Mohegan, right? It
13 wasn't like they were mob-infiltrated or anything like that.

14 MR. BIAGETTI: No.

15 THE COURT: All right, so, I mean, it's not as
16 if -- how do I say this on a pleading standard, that they
17 would have gotten it or they wouldn't have gotten it? Now,
18 maybe they were second, but if the Commission had known all
19 this stuff, they wouldn't have chosen them.

20 MR. BIAGETTI: But it's exactly the "would have"
21 that is our point. In other words, they cannot show that
22 the elimination of Wynn would have inevitably led to the
23 coronation of Mohegan and therefore to the preclusion of
24 their injury. It's the fact that there is speculation
25 there, that you would have to apportion loss between

1 intervening events, that's the whole point of the cases.

2 Okay, so that's the first intervening independent.

3 The second one is, they're not the applicant.

4 Sterling had been an applicant in Phase 1. And you're
5 right, Judge, it makes your head spin, but they were an
6 applicant in Phase 1 with I believe Caesars. The Commission
7 did raise questions with regard to Caesars. Caesars drops
8 out, which means now Suffolk, which is, after all, just a
9 landowner -- they own a racetrack that they hope will
10 someday be --

11 THE COURT: But the thing with -- I read
12 somewhere, I think it was either in the complaint or the
13 briefs, that there was a contract that gave --

14 MR. BIAGETTI: Yes, there's a lease.

15 THE COURT: -- an absolute right to, if Mohegan
16 got it, to lease the land to Mohegan, right?

17 MR. BIAGETTI: Riddled with contingencies, Judge,
18 and we quoted some of them in our brief.

19 THE COURT: Enough, though, to get you through a
20 pleading standard.

21 MR. BIAGETTI: But, again, even if, even if the
22 lease were to stand, my point is that by Phase 2, because
23 Caesars got knocked out, Sterling didn't have a dance
24 partner. They elected not to proceed as an applicant in
25 Phase 2 -- Mohegan did -- and they elected instead to become

1 a prospective vendor, a hoped-for landlord to Mohegan in the
2 event that Mohegan won. So you have no guarantee that
3 Mohegan is going to win, and even if they win, you have no
4 guarantee that Mohegan is going to follow through on the
5 contract with Sterling. As they said in their opposition,
6 and they're right, that contract, that lease, prospective
7 lease is riddled with "standard outs" for the prospective
8 lessee. If you allowed RICO injury to be found in that
9 situation, every disappointed vendor to Mohegan, the folks
10 who hoped to sell them the playing cards would have a RICO
11 claim arising out of the fact that the MGC --

12 THE COURT: You'd better not suggest it. You'll
13 get all these other suits, huh?

14 (Laughter.)

15 MR. BIAGETTI: That's right. I guess that's a
16 silver lining. But that's my point. It's no different.
17 It's no different.

18 THE COURT: All right, all right.

19 MR. BIAGETTI: Last one. Last one, and I'm done.

20 THE COURT: One and done, all right.

21 MR. BIAGETTI: Yes, and it's sort of where I
22 started but I'll pick up. The Supreme Court cases, *Anza*,
23 *Hemi*, *Holmes*, they all ask fact-finders like you, Judge, or
24 evaluators of claims at motions to dismiss, to look to see
25 whether there are other potential vindicators of the alleged

1 wrong here. And, as I mentioned, you've got the certiorari
2 petition by Mohegan. In one of the handouts that I've
3 provided -- I think it's the one at Page 7 -- it talks about
4 what Mohegan is looking for in that petition. Mohegan had a
5 legitimate expectation that the Commission would follow the
6 law in awarding the license, and they have asserted harm by
7 the Commission's alleged deviations from that standard.
8 That's the way you challenge this action.

9 THE COURT: But what happens if Mohegan wins? Do
10 they suddenly take over Encore?

11 MR. BIAGETTI: You know, that's in the wisdom of
12 the State Court, but that's precisely --

13 THE COURT: But, I mean, does that make this suit
14 go away?

15 MR. BIAGETTI: -- challenging the process. I
16 think the plaintiffs would say "no," but I'll leave that to
17 them. My point is that you have incentivized --

18 THE COURT: I see, that's right, because if
19 Mohegan wins and they get Encore, that's not going to help
20 Sterling. I see.

21 MR. BIAGETTI: And the second incentivized
22 challenge, just to the last point that my brother made and
23 I'll sit down, is the Commission itself. The Commission has
24 continuing authority, Judge, over the suitability of the
25 applicant, meaning Wynn Mass.

1 THE COURT: There was a two-to-one vote, right, so
2 it was a really close vote?

3 MR. BIAGETTI: On some issues it was a two-to-one
4 vote, yes. But what the Commission said, and it's the last
5 handout that we have for you, is that -- I'm going to put it
6 up because it bears review. And this was the subject of
7 submissions by both sides last week to your Honor. But what
8 the Commission finally ultimately decided was that "After
9 careful review of the record in this matter, the Commission
10 concludes that there is no substantial evidence to support a
11 finding that Wynn Mass., Wynn Resorts, or any of its
12 associated qualifiers," meaning the individuals, "willfully
13 provided false or misleading information."

14 The Commission itself, after hearing all of these
15 allegations, said, "We stand by our decision. We don't
16 know." They said, quote, "There is no way for us to know
17 what we would have done had we known some of this back in
18 2013."

19 But my point to you, finally, Judge, is, they
20 declined to so speculate in a state agency review, which is
21 exactly where this ought to be. You should not, at the
22 invitation of plaintiff on a belated, flawed RICO claim,
23 accept that invitation to speculate on cause.

24 THE COURT: What's the RFA-1 licensing process?
25 Is that the entire suitability as well as the --

1 MR. BIAGETTI: Yes. That's the Region 1 process
2 which has two phases.

3 THE COURT: The two phases.

4 MR. BIAGETTI: Correct. Thank you so much for
5 your --

6 THE COURT: And there's no collateral estoppel or
7 res judicata here with the agency decision?

8 MR. BIAGETTI: You may take judicial notice of
9 agency decision, agency findings we cited, yes.

10 THE COURT: I see, I can take it, but it's not
11 binding.

12 MR. BIAGETTI: Correct.

13 THE COURT: Okay, thank you.

14 MR. BIAGETTI: Again, the point here is not simply
15 the result but the fact that it's been challenged. Thank
16 you.

17 MS. BERNSTEIN: Good morning, your Honor.

18 THE COURT: Good morning.

19 MS. BERNSTEIN: I will address both statute of
20 limitations, if you want to hear about it, and proximate
21 cause. I'll touch briefly on statute of limitations. I
22 think you're absolutely correct that you simply cannot know
23 of your injury until you're told the license is going to
24 somebody else. That happens in September. And it's not
25 awarded when you get the whole layout of how does Wynn do

1 and how does Sterling Suffolk do until you get the November
2 decision, but, in any event, the complaint in this case was
3 timely.

4 THE COURT: That's been well briefed.

5 MS. BERNSTEIN: Thank you.

6 As to proximate cause, they're saying that the MGC
7 had the authority to make this decision, and it did, but
8 what we are saying is, they were misled and didn't know
9 important information, and the harm to our client flowed
10 from that. So what we have to show for proximate cause is
11 that there's some direct relation between the injury
12 asserted and the injurious conduct alleged. And the *Holmes*
13 case, which really sets it all out, makes it clear that
14 proximate cause is a flexible concept that does not lend
15 itself to black letter rule that will dictate the result in
16 every case, and they're looking
17 to, so both for direct relation and for kind of how much of
18 a mess is this going to cause for us? So is it going to be
19 a problem if somebody not in direct relation who didn't
20 receive the misrepresentation themselves claims injury
21 because how are we going to apportion damages?

22 THE COURT: What do I do with the fact that the
23 Gaming Commission now knows most of it and that they didn't
24 change their decision?

25 MS. BERNSTEIN: Well, I would ask the Court -- and

1 I'm sorry your Honor didn't see it before. We filed what's
2 document 115 with our explanation for the Court as to just
3 some highlights of the decision and giving you that decision
4 so you could be aware of it, but the Commission clearly
5 said, "We are not saying what we would have done had we
6 known this."

7 Wynn has undergone pretty close, except for
8 Maddox, a top-to-bottom reorganization, and so what the
9 Commission was looking at is suitability now. They have
10 this big building over there that they would like to see
11 open in June, if possible, so they're assessing suitability
12 now. And they say in their decision at Page 38, "There's no
13 way for the Commission to definitively determine whether the
14 company," Wynn, "would have been deemed unsuitable at a
15 particular point in time between 2013 and the present, and
16 there's no way for the Commission to determine what steps
17 the company might have taken in 2013 to address these
18 matters if it had been disclosed, given that the Commission
19 focuses on suitability today."

20 They go on, however, to point to some incredibly
21 damaging things that happened, by the way, after the first
22 suitability determination. And, by the way, at that
23 Commission hearing, they made it absolutely clear that their
24 expectation is that suitability is an ongoing question. So
25 while there was a suitability determination in that

1 December, 2013 time period for Wynn, that suitability
2 determination was ongoing. And they were asked whether
3 there were other things out there, and the general counsel
4 failed to disclose allegations of sexual predation and
5 settlements of massive settlement figures in multiple, not
6 just one or two but multiple cases that were not disclosed.

7 And they were concerned that there was a memo
8 written by a lawyer who represented Wynn at a mediation with
9 a former employee who alleged that she was raped by Mr. Wynn
10 in the course of this mediation in the summer of 2014. That
11 was told to the Wynn general counsel. That lawyer -- it's
12 called the "Abbott memo" -- wrote up a memo about what
13 happened and sent it to the general counsel, Kim Sinatra,
14 who's a defendant in this action. So she was told that.
15 She didn't say anything to the Commission about it, although
16 there had been a direct request by the suitability
17 investigators for information about other settlements and
18 things like that.

19 And there was also a separate allegation -- I know
20 it's complicated, and we tried to lay out kind of the highlights
21 that matter for you, but --

22 THE COURT: Did the Gaming Commission know about
23 all the allegations involving FBT's property or the Mayor?

24 MS. BERNSTEIN: No. That hearing had nothing to
25 do with FBT. This last hearing was only about Steve Wynn's

1 sexual predation and what they knew about that and what they
2 did about that and how they treated their employees.

3 THE COURT: So was this whole issue with the Mayor
4 ever -- I know I keep --

5 MS. BERNSTEIN: No, no, no. Nothing about FBT,
6 nothing about the Mayor, nothing about Macau was dealt with
7 in this hearing. This hearing --

8 THE COURT: What about the first hearing?

9 MS. BERNSTEIN: In the first hearing, there was
10 some information about some of the hidden ownership
11 interests in the FBT property, but, as I think Mr. Storch
12 said earlier, not all of that was disclosed. And
13 significantly, in June of 2014, one of the owners, previous
14 owners, signed something that he had given up his interest
15 to this other guy, but he -- I'm sorry, I'm confusing
16 this -- but in so doing, he basically put in a false
17 submission because he didn't disclose the ownership interest
18 or the income stream that would flow to another individual,
19 and that was in June of 2014.

20 THE COURT: Was that Russo?

21 MS. BERNSTEIN: That is -- I'm sorry, I'm getting
22 my -- Paragraph 120, Gattinari's representation about
23 Lightbody's interest, that it was gone but it wasn't in fact
24 gone. And all of this stuff about the fix is in Paragraphs,
25 I believe, 110 to 120. So kind of what the Commission

1 looked into in that December hearing about the FBT ownership
2 interest is in there, both what was disclosed at that time
3 and what was not disclosed at that time. And there were
4 important things that they acknowledge were not disclosed at
5 that time. And they try to say, well, that's -- I don't
6 know how they can say that's not enough, but it was pretty
7 important stuff.

8 And back to what the Commission recently was
9 looking at, which is the sexual predation stuff, they talked
10 about, you know, some of its concerns about the Abbott memo,
11 which came out in July of 2014, which had this revelation
12 about the allegation of a rape of an employee, and Sinatra
13 didn't disclose it. And they say, "Sinatra, who was
14 intimately involved with the licensing process, denied being
15 aware of the allegations contained in the Abbott memo --"
16 this is in the course of their investigation -- "despite
17 being forwarded a copy to her company email address and
18 having responded to that email. The Commission is inclined
19 to conclude that her denial was motivated by
20 self-preservation, given the proximity of the issuance of
21 the memo to the licensing decision." And then the
22 Commission goes on to say, "We need not spend time
23 describing why it was essential that Mr. Wynn, Ms. Sinatra,"
24 and some others whose actions were looked into by the
25 Commission. "Certainly their continued employment would

1 make a finding that the company possesses the requisite
2 integrity, honesty, good character and reputation
3 exceedingly difficult to impossible, but they have been
4 removed, so we will not toil over that point."

5 So they are basically, the Commission is saying,
6 "Wow, that was awful," \$35 million worth of fine, which they
7 point out is in response to their actions before the
8 Commission from the very moment they started pursuing the
9 license to the present. So the fine covers the entire
10 period of wrongdoing that they know about it, although they
11 didn't go back to look at these FBT and may not even be
12 aware of these FBT issues. So --

13 THE COURT: Now, what do you think about the -- if
14 Mohegan Sun wins or loses, what impact does that have on
15 this litigation? If it wins, what, and if it loses, what?

16 MS. BERNSTEIN: Well, Mohegan Sun is suing the
17 Gaming Commission for the license --

18 THE COURT: Yes.

19 MS. BERNSTEIN: -- related to their denial, and
20 they're not going to, I don't believe, they can't stand in
21 the shoes of Sterling Suffolk for their losses.

22 THE COURT: But let's say they lose, and the
23 Gaming Commission is upheld in every decision, is that the
24 end of the deal for your client?

25 MS. BERNSTEIN: Well, I would submit that this is

1 an entirely separate action. That's a 1983 action. It
2 relates to the authority of the Gaming Commission to do what
3 it did. Our action relates to the injury that Sterling
4 Suffolk experienced as a result of the wrongdoing. So I
5 would submit that they're entirely separate actions, and
6 certainly the other action won't redress the injury caused
7 to our client. And --

8 THE COURT: Except if Judge Sanders, or on appeal
9 to the SJC, decides that the Gaming Commission was
10 appropriate, took into account all the salacious conduct and
11 still granted the license with the fine -- let's say they
12 say, "All right, a lot of yucky stuff went on, but still, at
13 the end of the day, those people are gone and the fine is
14 paid, and we'll uphold the discretion of the --" is that the
15 end of this suit because there's no way Sterling could ever
16 now get the deal?

17 MS. BERNSTEIN: Well, we're not -- we're looking
18 for damages. There's no way Sterling could get the deal
19 now. That ship has sailed. We're seeking recovery for the
20 injuries they sustained as a result of it.

21 THE COURT: It's just hard. Now, let's say
22 Mohegan wins --

23 MS. BERNSTEIN: If Mohegan wins --

24 THE COURT: What happens?

25 MS. BERNSTEIN: Well, Suffolk Downs, which is the

1 property that our client owned, and was, by the way,
2 completely core and central to the decision by the --

3 THE COURT: Then you have a winning case because
4 even if -- or at least a much stronger case -- if Mohegan
5 wins, then you can at least say, "Well, maybe Encore is
6 still built, but we would have been the --"

7 MS. BERNSTEIN: I don't know why we would have to
8 wait. And I say, the question that you're wrestling with
9 now is, is there an injury? We say there is. And the
10 wrongful conduct was the lies that they submitted to the
11 Gaming Commission. And I would submit to your Honor that
12 it's not at all clear that Mohegan Sun will advance. I
13 mean, this case has been actively investigated and pursued
14 by Sterling Suffolk. I don't know that Mohegan will be in a
15 position to present the same evidence that's been developed
16 here and that we are prepared to continue to develop in
17 discovery, and it certainly won't redress the harm.

18 THE COURT: Excuse me. In State Court, is it
19 based on an administrative record, or is there discovery?

20 MS. BERNSTEIN: Just the administrative record.

21 THE COURT: So it's like an administrative appeal.

22 MS. BERNSTEIN: Yes. It's going to be exceedingly
23 limited. I mean, they lost already, and they're appealing
24 through certiorari, but --

25 THE COURT: Oh, they lost before Judge Sanders?

1 MS. BERNSTEIN: Yes, right?

2 MR. STORCH: They lost, and it was sent back down
3 for --

4 MS. BERNSTEIN: I'm sorry. I'm not as familiar --

5 THE COURT: None of you briefed it, but obviously
6 I want to be respectful of the State Court processes, which
7 may or may not facilitate a resolution here. If Mohegan Sun
8 wins because it was inappropriately granted, you go down one
9 path. Then you can't argue that there's a proximate
10 causation issue. If Mohegan Sun loses, it may or may not be
11 dispositive. It's hard to say on what grounds. I'd have to
12 see it. I'm just curious.

13 MS. BERNSTEIN: I understand the impulse, but I
14 would suggest that it's not fair to these plaintiffs to make
15 them wait for a totally collateral challenge to the
16 Commission's action. This is claims against the wrongdoers
17 in Wynn and associates. That is not -- and the current --

18 THE COURT: I'm not proposing to stay this. I'm
19 just simply saying, if something comes up in the interim --

20 MS. BERNSTEIN: I'm sure you'll hear about it.

21 THE COURT: I'm sure I'll hear about it, if not on
22 the front page of the Globe, certainly in filings, but I
23 might need reargument about how that affects this.

24 MS. BERNSTEIN: Well, I mean, if that eventually
25 comes up, it can certainly and will be addressed.

1 And I think back to the questioning that you had
2 earlier for Mr. Biagetti was, how can you decide this now at
3 the pleading stage? They're going to have plenty of
4 opportunities to challenge the sufficiency of the evidence,
5 which functionally, your Honor, is what I think they're
6 trying to do. And those are questions for, at a minimum,
7 for a more developed record with the opportunity to do some
8 discovery, and it is just completely premature here.

9 THE COURT: I think we need to move on.

10 MS. BERNSTEIN: Okay, thank you.

11 THE COURT: I'm thinking -- after you, how many
12 people are there? One more?

13 MR. KATZ: Possibly one more.

14 THE COURT: Mr. Kelly and -- oh, two more. So
15 what we'll do is, why don't we get through this issue, and
16 then we'll take a break. So probably 15 minutes and 15
17 minutes?

18 MR. KATZ: Your Honor, I want to address the
19 enterprise issue on the association-in-fact RICO counts.
20 Those are the only RICO counts that FBT is a member of, but
21 I also want to address the predicate acts. And I think they
22 really do bleed together, so rather than break in between
23 those two arguments, I'd like to make them together.

24 THE COURT: Fifteen minutes, okay.

25 MR. KATZ: Just to back up a step, okay, FBT, who

1 is FBT? FBT was the owner of the Everett parcel where the
2 Encore is now being built. We have no role in the casino.
3 We have no relationship with Wynn at this point. There has
4 been no relationship with Wynn since the closing on that
5 parcel, which I think was in January of 2015. We were never
6 going to own or operate the casino. We were not a
7 qualifier. We were not an applicant for a casino license.

8 So what is FBT doing here? I feel like I'm caught
9 in the crossfire between Mohegan Sun's business partner
10 Sterling firing at Wynn. The reason why FBT is in this
11 courtroom is because they needed to find a RICO claim to get
12 into Federal Court, and they know that the RICO claim that
13 is just based on the Wynn entity has a serious legal defect;
14 that the defendant, the deep-pocketed defendant, RICO
15 defendant, is also the RICO enterprise itself. They have
16 attempted to plead around that problem by going this
17 association-in-fact route, where FBT is all of a sudden in
18 an association-in-fact RICO enterprise with the Wynn
19 enterprises and Wynn executives.

20 Now, at the beginning of our brief, I pointed out
21 that this was an implausible -- it is an implausible
22 association-in-fact. Why is that? There was not just a
23 state investigation, the investigations in Administration
24 Enforcement Bureau in violation for the Mass.
25 Gaming Commission, there was a U.S. Attorney's investigation

1 into all of the so-called mob ownership issues that your
2 Honor has referenced. We are not conceding that FBT was
3 ever mob owned. We are not conceding that FBT or any of its
4 members made false statements to the Gaming Commission. The
5 only thing I'd concede is that the U.S. Attorney's Office
6 thought that there was enough evidence of false statements
7 to Wynn --

8 THE COURT: Right, it was a different kind of
9 theory altogether.

10 MR. KATZ: It was a different type of theory
11 altogether. And so basically you had a U.S. Attorney's
12 Office investigation, which included wiretaps, which
13 included undercover sting operations, which included
14 cooperating witnesses at grand jury, including Wynn
15 witnesses going into the grand jury and testifying under
16 oath. There were wiretaps that I can't speak about in open
17 court but would address some of the questions that your
18 Honor has about what did the IEB know, what did the Gaming
19 Commission indirectly know? I'm happy to --

20 THE COURT: IEB stands for?

21 MR. KATZ: Investigations and Enforcement Bureau.
22 It's essentially a law enforcement arm that works at the
23 behest of the Mass. Gaming Commission. So they have State
24 Police --

25 THE COURT: It wasn't clear from the pleadings.

1 So they are the equivalent of what, the State Police?

2 MR. KATZ: Yes. I would say almost like Secret
3 Service or Postal Inspectors. They're very specialized.
4 They work for the Gaming Commission. They did work hand in
5 glove with the FBI on the investigation into FBT and its
6 members, including my client, Mr. DeNunzio.

7 Now, the theory in the federal criminal trial, it
8 was a wire fraud count, but the theory was that my client,
9 Mr. DeNunzio, and another FBT member, Anthony Gattinari, had
10 made false statements to both the Gaming Commission and Wynn
11 in order to deprive Wynn of money; namely, that Wynn would
12 not have agreed to pay \$75 million for the land had
13 Mr. DeNunzio and Mr. Gattinari been open and honest with
14 Wynn that Mr. Lightbody retained a 12 percent ownership. It
15 was not a sort of "fraud on the MGC to help Wynn obtain the
16 license" theory because of *Cleveland*, right?

17 THE COURT: Yes, but the government lost on that.

18 MR. KATZ: And the government lost. And so what
19 they do here -- because obviously Wynn can't be the victim
20 here of FBT's alleged lies to the Gaming Commission. Wynn
21 has to be part of the association-in-fact, right? So
22 they're now saying they're in cahoots. The reason that's
23 implausible is because after years of investigation, the
24 FBI, the U.S. Attorney's Office, the Gaming Commission, the
25 IEB, none of them ever jumped to this conclusion. And you

1 look at Paragraph --

2 THE COURT: But I can't do that on a motion to
3 dismiss.

4 MR. KATZ: I think under *Twombly* you can, your
5 Honor. I also think under Rule 9(b) because, remember, this
6 is a fraud case.

7 THE COURT: Well, they've claimed, and is this
8 true or not, that there was a side deal with a guy named
9 Russo and that money was going to be funneled to the Mayor?
10 I mean, that stuck with me. Was that vetted in the criminal
11 trial?

12 MR. KATZ: So the Massachusetts Gaming Commission
13 knew that Jamie Russo, or James Russo, was due to receive,
14 under a consulting agreement that went back some ways, a 3
15 percent share of the proceeds from the Everett parcel sale.
16 So the Gaming Commission knew that. That was also raised at
17 the federal criminal trial. It's an allegation in the
18 indictment in the federal criminal trial where, of course,
19 our defense is that there was no hidden ownership at all.
20 It wasn't that, "Oh, Wynn is not a victim. They're our
21 coconspirator." That was not our defense.

22 THE COURT: And was it known that some of that was
23 to go to the Mayor? I stick with that because that does
24 sound like --

25 MR. KATZ: So your Honor --

1 THE COURT: -- something of concern, let's put it
2 that way, if it's true.

3 MR. KATZ: I would like to address that. I can't
4 do it in open court. If your Honor wants a particular fact,
5 I would like to raise it at sidebar.

6 THE COURT: I don't think we can unless all the
7 attorneys get to see it.

8 MR. KATZ: I will just say that that was part of
9 the federal criminal investigation, whether there was a
10 kickback arrangement with Mayor DeMaria. It was, I will
11 say, thoroughly investigated. I can't reveal everything
12 that was part of that investigation in open court because
13 there is a protective order. I believe the IEB knew about
14 that aspect of the FBI's investigation of the Mayor's
15 office, and that was never deemed to be credible. And if
16 you look at the complaint here, and this is why --

17 THE COURT: So it was part of the criminal trial
18 or not? In open court, it was not?

19 MR. KATZ: It was not because there was no -- it
20 was part of the investigation that the FBI did and the U.S.
21 Attorney's Office did, but it wasn't part of the criminal
22 trial because there was no credible evidence that Mayor
23 DeMaria was going to be receiving money through Jamie Russo
24 as a funnel. And if you look at the complaint -- and this
25 is why Rule 9(b) is so important in cases like this, where

1 they're not just claiming fraud against Wynn and FBT but
2 they're saying the Mayor was in on it; they're saying Steve
3 Crosby, the former Commissioner of the Gaming Commission,
4 was in on it.

5 THE COURT: No, not really.

6 MR. KATZ: If you look --

7 THE COURT: No, no.

8 MR. KATZ: If you look, he's not a defendant, your
9 Honor, but he is replete in the paragraphs, I think it's
10 around 56 --

11 THE COURT: But they're not claiming he got a
12 kickback or anything?

13 MR. KATZ: No, not a kickback, but they're saying
14 that he was a bad actor, that he was not doing his job
15 properly.

16 THE COURT: But it wasn't the same as what they're
17 alleging with respect to the Mayor.

18 MR. KATZ: Agreed, agreed a hundred percent. But
19 if you look at the kickback allegations with respect to
20 that, they are unbelievably thin. I don't think they even
21 satisfy *Twombly* and Rule 8, but they certainly don't satisfy
22 Rule 9(b). They are the very definition of conclusory.

23 Now, back to the enterprise issue, Judge,
24 Paragraph 88, I think you really need to pay attention to
25 Paragraph 88. When addressing whether they have plausibly

1 and in satisfaction of Rule 9(b) alleged an
2 association-in-fact involving FBT, they simply say,
3 "Accordingly, at some point no later than November or
4 December, 2012 --" that's when the option agreement is
5 signed -- "the Wynn defendants and FBT entered into a mutual
6 understanding that FBT would create whatever false and
7 backdated paperwork might be necessary for purposes of the
8 Wynn defendants' application in order to make ownership of
9 the Everett site appear less tainted than it actually was."
10 They don't provide the details that Rule 9(b) requires to
11 actually flesh out that conclusory allegation. I think you
12 can resolve the association-in-fact question both on *Twombly*
13 grounds and Rule 9(b) grounds. They simply have not pled
14 the facts sufficient for an association-in-fact fraud
15 enterprise.

16 But there is a reason, your Honor, why the bulk of
17 our brief -- and we started with the racketing acts, the
18 predicates, do they actually allege any predicates, because
19 it was cleanest, simplest off ramp available to this Court,
20 and it resolves all of the Court's questions about, what are
21 we doing here in Federal Court while there is a State Court
22 proceeding, and, more importantly, a state administrative
23 agency that is addressing, maybe not to their liking, but
24 addressing and resolving all of these issues?

25 *Cleveland v. The United States*, we'll start there.

1 That's the case where there was a false application to the
2 Louisiana State Gaming Commission, the Louisiana equivalent
3 of the Massachusetts Gaming Commission. And the wire fraud,
4 a criminal wire fraud case, the wire fraud claim there was
5 that, "Look, you made false statements to the Louisiana
6 Gaming Commission in order to obtain this license to operate
7 slot machines." And the Supreme Court said that is not a
8 wire fraud. A license in the hands of a state agency is not
9 property. And the reason it's not property is twofold: One
10 it's not tangible, right? And it's not the type of
11 intangible right that you can transfer and sell. This is a
12 regulatory license. But the second is, the Supreme Court
13 was deeply, gravely concerned that the federal government
14 would start injecting itself into matters of local concern.

15 This case is even more offensive than what the
16 U.S. Attorney's Office did in *Cleveland* where the Supreme
17 Court said "no." Here, they're asking this Court, and maybe
18 even a jury, to decide, what would the Gaming Commission
19 have done if all of these lies had been aired out back in
20 2012 and '13 and '14? I agree, there is an Encore building
21 now built, and that may be some sort of anchor in the MGC's
22 decision-making right now. It's probably part of the
23 analysis.

24 THE COURT: You can see it from the courthouse.

25 MR. KATZ: You can see it from the courthouse,

1 right. So I agree with my sister that that is sort of in
2 the mix, so to speak, when they're deciding now whether to
3 take the license away.

4 THE COURT: Yes, they rushed through the people.

5 MR. KATZ: Right.

6 THE COURT: They imposed a fine. They've got a
7 building. Their hands were tied a bit, right?

8 MR. KATZ: Right, but in -- so in the decision
9 that was released last week, the Gaming Commission said it
10 would be impossible to actually go back, step back and say,
11 "What would we have done had all of these allegations been
12 aired out?"

13 THE COURT: That's proximate cause.

14 MR. KATZ: I don't think so, your Honor, because
15 what *Cleveland* says is, you can't plead this as a wire
16 fraud, right, because it's not property and because we don't
17 want the federal government injecting itself into matters of
18 local concern, right? So what they're trying to do is plead
19 around *Cleveland*, plead essentially the *Cleveland* facts as a
20 Travel Act predicate, plead it as a 1961(1)(a) state law
21 gambling offense, and none of those things are actually
22 racketeering acts.

23 THE COURT: Well, can I just say, I understand you
24 have a very strong argument with respect to *Cleveland*, but
25 that's only one of their theories.

1 MR. KATZ: Correct.

2 THE COURT: The involving gambling, that's not so
3 self-evident. And so there are a number of cases that talk
4 about it not just involve like a blackjack, an actual
5 gambling offense in terms of the act of gambling, but also
6 higher-level management kinds of violations that involve
7 gambling administration.

8 MR. KATZ: True, but --

9 THE COURT: So there's something broader than what
10 you're urging me to do.

11 MR. KATZ: No, I don't think so, your Honor. So
12 certainly if you're secretly and illegally running a
13 gambling enterprise, even if it's, say, a casino hotel,
14 right, if Steve Wynn all of a sudden unbeknownst to the
15 Gaming Commission comes in and starts, you know, acting as
16 the pit boss, even though they say, "Hey, Steve Wynn is out,
17 he's not suitable, he doesn't have a license anymore," but
18 he comes in and starts running the casino operation, I think
19 the federal government could bring that as a 1961(1)(a)
20 offense as long the casino is actually up and running.

21 But what they're saying were offenses involving
22 gambling were acts that predate by at least five years any
23 of the gambling operations that may take place at the
24 Encore. They're saying that, "Hey, *Cleveland v. United*
25 *States*, the U.S. Attorney's Office couldn't allege that as

1 wire fraud, but they could have just charged it as a RICO
2 offense." I mean, that's essentially what they're saying,
3 that *Cleveland* is easy to plead around by saying, "If you
4 apply for a license, a gambling license fraudulently, or you
5 make false statements to get that license, you can't be
6 charged with wire fraud, but, hey, you can be charged with a
7 RICO offense," because, after all, what are you going to do
8 with that gambling license? You're going to repeatedly
9 engage in gambling offenses, right? I mean, you're going to
10 get up and running. You're going to --

11 THE COURT: I just don't think you have case law
12 that goes this way. Let's say you fraudulently apply to run
13 a gambling establishment, you're saying you can't charge
14 that as a gambling violation? You violate state law in how
15 you apply it to run a gambling enterprise? I mean, I
16 understand your very narrow issue, which is it doesn't --
17 you want me to say it just has to involve the act of
18 gambling as opposed to the act of applying to run a gambling
19 institution, but I don't know the case law supports such a
20 narrow reading.

21 MR. KATZ: Right. So I think, your Honor, I have
22 two answers to that. One is, there may be an unripe RICO
23 violation under 1961(1)(a). So maybe once the gambling
24 business gets up and running and they start taking bets, you
25 can go back and say, "Hey, you obtained that fraudulently,

1 and therefore you essentially are illegally operating a
2 casino."

3 THE COURT: Yes.

4 MR. KATZ: But the second thing is, the person
5 that would have standing to bring a claim like that would
6 not be Sterling Suffolk. They are focused not on the actual
7 activities going on in the casino because, of course, none
8 have taken place, and they're not saying they're injured by
9 any of the acts in the casino. They're focused squarely on
10 the licensing process. And I think it is beyond bizarre to
11 consider the possibility that the Gaming Commission would
12 just say, "We're not going to readdress whether Wynn would
13 have won the license had we known all this stuff in 2014,"
14 okay? But Sterling can come into Federal Court and
15 basically, you know, put the Gaming Commissioners -- what
16 would they do, put the Gaming Commissioners under oath and
17 say, "I know as an administrative matter you guys are
18 refusing to do a do-over in the administrative tribunal, but
19 we're going to have a do-over right here in Federal Court,
20 and we're going to ask you, what would you have done? And
21 we're going to have a jury decide whether you're telling the
22 truth when you say it's just not possible to know." That is
23 exactly what the Supreme Court said --

24 THE COURT: That goes back to proximate cause, not
25 whether -- because I don't know that you can say it's not

1 involving gambling to make a fraudulent statement about your
2 application; you don't disclose either, you know, allegedly,
3 mob ties or allegedly sexual violations. It's not involving
4 gambling? I guess I -- I hear your argument, but I'm
5 struggling with that.

6 MR. KATZ: Well, I think, your Honor, that would
7 read "involving" to essentially mean "related to." It would
8 basically supplant and replace the word "involving" with
9 something that has an even more broader connotation.
10 There's not a single case that they can point to where a
11 1961(1) (a) offense has been predicated on something other
12 than actual gambling activity, where there's actual gambling
13 activity taking place.

14 THE COURT: *Goldfarb*?

15 MR. KATZ: There is gambling in *Goldfarb*. I mean,
16 that's the case where there was a casino that was up and
17 running.

18 THE COURT: Right, but the violation had to do
19 with the administration of it, not actually that they were
20 cheating at the gambling, or that they were extorting money
21 to pay back the gambling. I mean, that was about the
22 running of a gambling business.

23 MR. KATZ: Right, but the individual who is
24 actually running the gambling business I would say is more
25 involved in gambling than simply the person who is, like,

1 dealing cards at the card table.

2 THE COURT: All I can say is that this opinion
3 won't be written by June 23, or whenever it is you're
4 opening, if that's the distinction that -- I mean, I got
5 more briefs than I think you get in most cases.

6 MR. KATZ: But, Judge, I think, you know, to look
7 back at what the offense is, especially in the RICO counts
8 where FBT is a defendant, the association-in-fact, they're
9 saying it's all confined to this licensing process, which
10 predates any gambling activity by five years, and that is
11 precisely the type of question, what would a state
12 administrative tribunal have done that the Supreme Court in
13 *Cleveland* --

14 THE COURT: I understand, I understand. I
15 understand. It's a causation issue. How do you prove that
16 the Commission -- so much has happened -- what they would
17 have done if they had known all this stuff about sexual
18 predation, et cetera?

19 MR. KATZ: Respectfully, your Honor, I don't think
20 so. I think you can read the word "involving" and certainly
21 you can read the Travel Act in a way that says, if you can't
22 point to misconduct that occurred in closer relationship
23 with gambling than this, you can't be in Federal Court,
24 because what we cannot have a Federal Court doing and a
25 federal jury doing is saying, "What would the Gaming

1 Commission have done? Would they have actually issued the
2 license had they known all this stuff?" Because if the
3 answer is, the Gaming Commission would have issued the
4 license anyways, maybe they would have put a fine on them,
5 right?

6 THE COURT: All right, thank you. I get the
7 issue. We need to move on. We're at eleven o'clock. Who's
8 going to handle these issues? Mr. Storch?

9 MR. STORCH: Yes. Your Honor, with respect to the
10 plausibility of FBT being involved in this enterprise, as we
11 lay out in the complaint --

12 THE COURT: Would you bring the mic up a little
13 bit. I know this is awkward.

14 MR. STORCH: Is this any better? Why don't I do
15 this. Now I'm working without notes. Your Honor, with
16 respect to it not being plausible that FBT was part of this
17 enterprise, FBT, as our complaint alleges, was central to
18 this. This casino could not have gotten off the ground
19 without FBT because there was no other site that the Wynn
20 defendants had. They needed this site. The problem was,
21 the site came along with criminals, and they couldn't
22 disclose that. So they, as we allege in the complaint,
23 agreed among themselves that they were going to conceal
24 those criminal elements, and they had to because the
25 requirement of the statute was, they had to disclose the

1 ownership for the 20 prior years. So FBT was integral to
2 this. It made numerous misrepresentations to the
3 Commission. It helped facilitate agreements between the
4 Wynn defendants and Mr. Lightbody in terms of acquiring
5 additional property. It was the instrument through which
6 the arrangement with the Mayor was made. FBT, and we lay it
7 out in the complaint -- I don't want to belabor it unless
8 your Honor has specific questions about what we allege about
9 FBT --

10 THE COURT: But what I do want is, subject to
11 Rule 11 and the *Iqbal-Twombly* standard, the new piece here
12 is the allegation with respect to the Mayor, which, I mean,
13 he's an elected official. What is your good-faith basis for
14 believing that?

15 MR. STORCH: Our good-faith basis, your Honor, is
16 based on interviews with people who were present. And we're
17 a little reluctant because of some of the confidential
18 issues and what's ongoing with certain potential
19 investigations, we're a little bit hesitant about
20 disclosing --

21 THE COURT: I don't know what to do with that.
22 Each of you appear to be relying on confidential
23 information. It is something that I think the Gaming
24 Commission didn't have because it sounds as if it's
25 evolving; or it may be true, it may be not true, but I don't

1 know what to do with that.

2 MR. STORCH: Okay. Your Honor, we're happy to --

3 THE COURT: Think about it.

4 MR. STORCH: Well, yeah.

5 MR. KATZ: Mr. Storch, if you want to put it under
6 seal, post-argument submissions on the confidential stuff,
7 I'm fine with that.

8 THE COURT: Think about it, and maybe you talk
9 afterwards.

10 MR. STORCH: Okay. But those are interviews, your
11 Honor, and also other corroborating evidence that we could
12 also lay out.

13 THE COURT: We don't want to besmirch somebody's
14 reputation in this lawsuit if it's already been dispensed
15 with, as your brother says over there.

16 MR. STORCH: Right. We'll talk about that and see
17 where we come out.

18 THE COURT: All right.

19 MR. STORCH: With respect to the issues, which I
20 think your Honor is correct that it relates to proximate
21 causation, you know, what would the Commission have done, I
22 think this is not in the realm of speculation. At the time
23 that the licenses were awarded, there was a decision that
24 outlined the attributes of the two competing applicants, the
25 Mohegan Sun applicant and Wynn, and it's clear from that

1 evaluation that Mohegan Sun clearly met every standard, in
2 fact exceeded --

3 THE COURT: So why weren't they picked?

4 MR. STORCH: Well, your Honor, that's kind of the
5 thrust of our action, which is that the Commission was
6 misled, that there were misstatements that were made, that
7 there was --

8 THE COURT: No, but most of what you talked about
9 had to do with Wynn, not about something wrong about Mohegan
10 Sun. I mean, you're saying basically they were a
11 competitor, that Wynn just beat them out, and if the
12 Commission had known everything that you say, they would
13 have clearly chosen Mohegan Sun?

14 MR. STORCH: Well, because the Commission found
15 Mohegan Sun was clearly qualified. They were clearly
16 qualified.

17 THE COURT: I see.

18 MR. STORCH: And if you take Wynn out of this
19 picture, Mohegan Sun gets the license. There were only two
20 applicants. I know they want to speculate and say, well,
21 the Commission may have just decided they're not going to
22 award any license, but based on an extensive record and the
23 investigation and the glowing reports, frankly, of Mohegan
24 Sun, it really is in the realm of just mere speculation that
25 somehow the Commission would have said, "Okay, well, you

1 know what? We've now found out this stuff about Wynn, so
2 we're going to disqualify everybody and not grant the
3 license."

4 THE COURT: Mohegan Sun has not joined this suit,
5 so --

6 MR. STORCH: Mohegan Sun has taken its own
7 independent course of action. The relief they're seeking is
8 different than the relief that SSR is seeking. The relief
9 that we are seeking here is in no way duplicative in any way
10 of what Mohegan Sun would be seeking. In fact, if Mohegan
11 Sun brought a damage claim --

12 THE COURT: But if Mohegan Sun wins the license,
13 you're not going to get a piece of the profits.

14 MR. STORCH: That's correct. That deal is over.
15 The property that SSR owned has been sold. It's no
16 longer --

17 THE COURT: You're out of luck.

18 MR. STORCH: We're out of luck, and we think
19 unlawfully out of luck. But the damages that we seek here
20 are separate and distinct from anything that Mohegan Sun
21 would be seeking. And in fact, if Mohegan Sun brought an
22 action for damages, they'd have to deduct as expenses the
23 amount that we're claiming in this lawsuit, so there would
24 be no chance of a double recovery; and there's no difficulty
25 in terms of the allegation because the agreement laid out

1 very specifically how SSR was to be paid.

2 THE COURT: I shouldn't derail you. You need to
3 talk about the predicates because we'll take a break around
4 11:15.

5 MR. STORCH: Okay, fine. On the predicate acts,
6 your Honor, first, on the "involving gambling," we've
7 briefed that. We've cited cases where the Travel Act was
8 found to apply to gaming as opposed to gambling, where the
9 state law had actually cut out gaming from the gambling
10 statute and put it into its own separate statute. We cited
11 cases, the *AT&T* case, where the telephone company was
12 passing on billing while in connection with some gambling
13 operations, but *AT&T* wasn't conducting any gambling
14 operations. And we cited a case where someone who was
15 behind the scenes had not made full disclosure of his
16 involvement where the Travel Act was found to apply. None
17 of those were actually involved in the act of gambling.

18 If you take my brother's argument --

19 THE COURT: The Travel Act, do you agree with him,
20 though, on the -- what was it, the "involving gambling"
21 argument?

22 MR. STORCH: Do I agree with his argument as to --

23 THE COURT: In other words, you were just
24 referring to the Travel Act.

25 MR. STORCH: Yes, right, and the "involving

1 gambling" really comes out of the RICO statute. All right,
2 the Gambling Act actually is a little bit broader. It talks
3 about promoting -- I may be misquoting the exact language --
4 promoting, establishing. It has a whole range of things,
5 not just, you know, gambling itself. So I think the Travel
6 Act was meant to be very broad. And in fact, when the
7 Travel Act was passed, it was because the federal government
8 saw such danger in gambling, that it could be such a threat,
9 that they wanted to have their own federal structure
10 superimposed over the state structure because of the threat
11 of infiltration of crime into gambling. So the Travel Act
12 was actually written and passed to be very expansive. It
13 wasn't meant to be crabbed or very limited. But under their
14 argument, up until the day that the Encore opens, there
15 could be no Travel Act violation, but the next day, that
16 there could be, and that's just an unduly limited reading,
17 we think, of the Travel Act and of the RICO statute as it
18 incorporates it.

19 Actually, what the Travel Act says is
20 "Facilitating the promotion, management, establishment, or
21 carrying on of a gambling business in violation of state
22 law." It's a very broad statute.

23 One last thing on the wire fraud. On the wire
24 fraud analysis, those cases all deal with a situation where
25 the court says that property in the hands of the state or

1 licensed in the hands of the state is not property. None of
2 them deal with the issue of a damage claim against the
3 recipient of the license who now has an income stream, and
4 that we're seeking damages for their wrongful conduct which
5 denied us that income stream.

6 THE COURT: That's a stretch for you. I mean,
7 that's a hard case for you to get around.

8 MR. STORCH: We don't have a case to support that,
9 your Honor, but I do think that those cases, they are very
10 specific about saying "in the hands of the government."

11 THE COURT: Wasn't that Carolina one just -- it
12 was about a gaming license, wasn't it?

13 MR. STORCH: Yes, it was, your Honor. But, again,
14 these cases are very specific: It's "in the hands of the
15 government," and that's the distinction that we would make.

16 THE COURT: Okay. Well, thank you. I think it's
17 a good time for us to break now. Just before we do this
18 organizing, Mr. Kelly, what are you going to be discussing?

19 MR. KELLY: I'll try to cut to the chase --

20 THE COURT: No, not right now. We're going to
21 take a 15- or 20-minute break, but what is the issue you're
22 going to address?

23 MR. KELLY: Your Honor, I'd like to address
24 Count 1, the "but for" causation defect, and then Count 2,
25 the many defects in that, particularly with respect to the

1 recent opinion by the Gaming Commission.

2 THE COURT: So is that going to overlap some?

3 MR. KELLY: I don't think so.

4 THE COURT: And what are you going to discuss?

5 MR. KRAMER: James Kramer, your Honor. Some
6 specific elements as it relates to my client, Kim Sinatra.
7 There are some State Court claims against her, and I just
8 want to briefly talk about --

9 THE COURT: Yes, we haven't talked about the State
10 Court claims.

11 MR. KRAMER: And I promise I will probably be
12 probably five minutes.

13 THE COURT: It's an important case. I've
14 allocated the morning. I just don't want to get repetitive
15 because one of the things, if I keep the RICO claim, then I
16 will address the State Court claims, but if I don't, I may
17 remand the action, so -- and it probably should go to -- so
18 I wouldn't probably resolve the State Court claims just for
19 the fun of it. It sounds like the State Court -- so I'm not
20 going to spend as much time on the State Court claims.

21 Okay, thank you. We'll stand in recess.

22 THE CLERK: All rise.

23 THE COURT: Come back in about 20 minutes, say,
24 20, 25 minutes?

25 (A recess was taken, 11:12 a.m.)

1 (Resumed, 11:43 a.m.)

2 THE COURT: Let's just sit and get going and just
3 hand it to her, okay? That's good. All right, Mr. Kelly.

4 MR. KELLY: Yes, good morning, your Honor. If you
5 don't mind, I'll stand right here and have my papers there
6 if needed.

7 THE COURT: I never have a problem hearing you,
8 Mr. Kelly.

9 (Discussion off the record.)

10 MR. KELLY: So I just want to make it clear for
11 the record that on behalf of my client, Mr. Wynn, he is not
12 conceding, that is not conceding that there are any properly
13 pled racketeering acts against him. That's number one.

14 Number two, I'd like to first address Count 1,
15 which is the RICO substantive count which focuses on the
16 supposed failure to reveal the criminal activities involving
17 FBT. I would submit to the Court that that count is flawed
18 because it fails to set forth the required "but for"
19 causation because none of the so-called lies about FBT could
20 have caused the Commission to grant the gaming license to
21 Wynn Resorts, and here's why: If you look at the complaint
22 itself -- let me show you Paragraph 110 -- there's a clear
23 date problem that the plaintiff has. In Paragraph 110 it's
24 clear, as they've alleged in their complaint, the amended
25 complaint now, that as of July, 2013, the Wynn defendants

1 were known to the Gaming Commission to have associated with
2 known felons and to have failed to disclose those
3 affiliations. That's in their own complaint. Shortly
4 thereafter in their complaint, in Paragraph 139, they
5 concede, as they must, that the Gaming Commission awarded
6 the license much later, over a year after they obviously
7 already knew about these things involving FBT.

8 Now, the problem for the plaintiff's Count 1 do
9 not end there because I think, as we pointed out in our
10 brief, there is, as has been noted, there's an investigatory
11 arm of the Mass. Gaming Commission called the IEB; and that,
12 as the Court has pointed out, you're correct, a lot of state
13 troopers, a lawyer, and they investigated a lot of these
14 allegations. And in fact, back in December of 2013, well
15 before this license was awarded, they issued a report, and
16 we attached it to Document 84. It's Exhibit A to Document
17 84, and in our opening brief at Pages 9 and 10 we put forth
18 a chart which is hopefully helpful, and I'd like to put it
19 back up so the Court can take a look at it because the chart
20 shows what's already known to the Commission in December of
21 2013.

22 So on what is I guess the left-hand side of the
23 chart is what's in the amended complaint, and yet that's
24 already been reported upon and known about by the IEB in
25 December of 2013, so the right-hand side is in fact

1 everything that they knew about.

2 THE COURT: So you're saying there's nothing new?
3 There's nothing new in the complaint that was not presented
4 to the IEB or the Commission?

5 MR. KELLY: I think the only thing that's a close
6 call --

7 THE COURT: Wasn't there a backdating thing?

8 MR. KELLY: Well, that is there. The backdating
9 is -- on this chart, if you look in the right-hand side,
10 fourth one down --

11 THE COURT: Excuse me. Let me just get to this.
12 This is --

13 MR. KELLY: This is Docket 84. This would be
14 Steve Wynn's opening brief.

15 THE COURT: Page?

16 MR. KELLY: Well, it's our Page 9, but on the
17 docket it's Page 14. And it talks about --

18 THE COURT: I see. So there is backdating there.

19 MR. KELLY: Yes. There's also the stuff about
20 Lightbody being a convicted felon. There's also the stuff
21 about DeCicco being convicted. And then there's even, if
22 you go to the next part of this chart, the top of the next
23 page, you'll see that "The IEB," the investigatory arm of
24 the Gaming Commission, "knew in December of 2013 that
25 Lightbody may have a legal reversionary interest in the

1 event," blah-blah-blah.

2 So these matters were no big secret to the Gaming
3 Commission, and in fact they award the license despite this.
4 So that's why I think the Court with respect to the "but
5 for" causation theory could in fact dismiss Count 1. And
6 significantly again for my client, there aren't two
7 racketeering acts alleged against him in Count 1.

8 Count 2, Count 2 is also a RICO substantive count,
9 and that one's --

10 THE COURT: Well, wait a minute. So what is the
11 one you said that the Gaming Commission did not know? Do
12 you remember?

13 MR. KELLY: Yes. I think the only allegation that
14 could be argued that was not before them was whether or not
15 De Salvio entered into a secret side agreement with
16 Gattinari. That's at the bottom of Page 10, but this is
17 certainly not a misrepresentation, in our view, that is
18 found in the mail fraud statute.

19 THE COURT: Why?

20 MR. KELLY: Because, as we've set forth in our
21 brief, we don't think it's -- first of all, Steve Wynn had
22 no idea about it, so with respect to my client, it's not a
23 proper predicate. And, secondly, we don't think it's
24 actionable under the case law that we set out there. And we
25 think there's also perhaps a reference -- there might be a

1 reference to the Mayor issue that the Court mentioned
2 earlier that's not in what I just pointed out. But the
3 Mayor issue, again, how is Steve Wynn supposed to know that?
4 But, secondly, with respect to the Mayor, we don't think
5 it's legally sound as an honest services accusation because
6 there's no quid pro quo, as required to be alleged, in the
7 amend complaint on the Mayor issue. Secondly, we think as
8 pled, as they pled it in the amended complaint, they focused
9 on 2016, which is, of course, after this was awarded. So I
10 think to Mr. Katz's point under 9(b), the way they pled it
11 is wrong. So if you take all of that into consideration, we
12 would urge the Court to dismiss Count 1. We'd also
13 urge the Court to dismiss Count 2 for a variety of reasons.
14 I won't go over all the ones my colleagues have gone over,
15 but I would like to point out a couple of critical things
16 about Count 2. Count 2 is the RICO substantive charge that
17 focuses on the alleged misstatements regarding the sexual
18 misconduct allegations.

19 Now, first of all, I think it has to be pointed
20 out that the Gaming Commission itself has said it was not
21 misled. It just issued the report. That report doesn't
22 help them. That report is devastating to them because if
23 the Court looks at Pages 17 to 21 of the Gaming Commission's
24 recent order, it says multiple times it was not misled; and,
25 in fact, I would urge the Court to focus on the top of

1 Page 18.

2 THE COURT: Well, something must have triggered
3 the \$35 million fine.

4 MR. KELLY: It did, but it wasn't the
5 misrepresentation.

6 THE COURT: What was it?

7 MR. KELLY: That's inaccurate, and that's not
8 the --

9 THE COURT: Well, what was it? They didn't
10 disclose it first time around, right? And you can't say
11 Mr. Wynn didn't know, so --

12 MR. KELLY: Well, wait a minute. They imposed the
13 \$35 million fine because Wynn Resorts, according to them,
14 failed to comply with their own internal sexual harassment
15 policies. They didn't say it was because there's
16 misrepresentations that were made. And in fact they say
17 twice on Page 17, "There's no substantial evidence that Wynn
18 Resorts, Wynn Mass., or any of the associated qualifiers
19 willfully provided false or misleading information to the
20 Commission during the review process." And they say it
21 again. And more importantly, more importantly, I think,
22 because all of these so-called racketeering acts are based
23 upon alleged lies, at the top of Page 18 of the report they
24 say --

25 THE COURT: When did this report come down?

1 MR. KELLY: Last week, your Honor, and we filed
2 something Friday. I apologize, but it just came down, so we
3 filed something Friday. What's the docket number on that?
4 Let me check.

5 THE COURT: I'll find it.

6 MR. KELLY: Well, anyway, to me, your Honor, I
7 think for the Court's purposes, if you look at the top of
8 Page 18, you can see it says, "None of the applications,"
9 none of them, "contain any questions that specifically
10 required the disclosure of information related to the
11 allegations, settlements, or other evidence of wrongdoing at
12 issue here."

13 So if their applications didn't require them to
14 provide this information, why are we here? How can we be
15 here saying there's racketeering acts because there was
16 falsehoods? There wasn't. None of the applications even
17 required it, and, in fact, in this report just issued last
18 week they say they were not misled.

19 Now, \$35 million is a big number, it catches
20 anyone's attention, but that has nothing to do with them
21 finding there were falsehoods. It has everything to do with
22 the fact that, according to them, Wynn Resorts did not
23 follow its own internal policies. So the Court should not
24 be misled by the fact that there was this prominent and
25 fairly well -publicized award. It did not pertain to

1 falsehoods. And in fact they say there were no falsehoods,
2 and they say none of the applications in fact contained any
3 questions that requested the information that's ostensibly
4 falsehoods. So I think that's an important point for the
5 Court to consider when analyzing Count 2.

6 THE COURT: So this is what's new for me from how
7 I prepared this, this report, what weight do I give the
8 report? In other words, there certainly were lots of
9 serious allegations when I started preparing this, and
10 you're saying I have to take that as dispositive that the
11 Commission said that they didn't feel misled?

12 MR. KELLY: Well, your Honor, I'd say the
13 plaintiff helpfully put it into the record and said you
14 could take judicial notice of it, and we agree with that.
15 And we'd also point out that the Commission spent a lot of
16 time on it. They had hearings, they had investigators, and
17 the Court should -- if the body that was supposedly duped
18 says it wasn't duped, then why should we be in Federal Court
19 on a civil RICO case claiming, you know, all this duping is
20 a cause of action? There was none. There was none. So
21 that's what I'm suggesting the Court should do.

22 I think the report also on Page 20 shows that
23 Mr. Wynn was not required to disclose this entity-wide that
24 they go on and on about, so --

25 THE COURT: I'm going to have to obviously read

1 it, but you think I can take almost as a judicial notice of
2 the fact finding?

3 MR. KELLY: I do.

4 THE COURT: Or do you think it's collateral
5 estoppel as to the fact-finding?

6 MR. KELLY: I do, and it's Pages 17 to 21 I'd urge
7 the Court to look at most. Obviously the whole thing, but
8 that's where I'm getting this argument from.

9 THE COURT: If they say they're not sure what they
10 would have done back in the day, but now that they've fired
11 Sinatra and Wynn and paid the fine, they're suitable now,
12 the distinction between then and now.

13 MR. KELLY: But I think they also say in there
14 they're not even sure what would have happened if they had
15 known all this back then, to one of my colleague's points
16 earlier. Therefore, how can this downstream third putative
17 victim -- you know, they're not Mohegan Sun -- they're a
18 potential landlord of Mohegan Sun -- how can they --

19 THE COURT: There's a binding contract, so I don't
20 know, they're not so remote, not like the card dealers or
21 whatever the hypothesis was. But what you're saying is, if
22 the Commission itself says it wasn't misled, what weight do
23 I give that in this analysis?

24 MR. KELLY: It's like in these False Claims Act
25 cases -- I forget the name of the Supreme Court case that

1 recently came down -- where if the federal government is
2 saying it wasn't defrauded, then a private whistleblower
3 bringing a civil qui tam case can't claim the federal
4 government was defrauded. It's similar. And I forget the
5 name of the case. Anyway --

6 MR. KATZ: *D'Agostino* is the First Circuit case,
7 *D'Agostino*.

8 MR. KELLY: It's following the Supreme Court
9 precedent. It's the same idea. The Gaming Commission is
10 saying it wasn't lied to, and yet they want to make a RICO
11 case out of this notion that the Gaming Commission was lied
12 to.

13 THE COURT: In fairness to them, they did all this
14 before they had an opinion.

15 MR. KELLY: Well, yes.

16 THE COURT: It suddenly came down Friday or
17 Thursday.

18 MR. KELLY: That's true, your Honor, that's true.
19 I'm not saying they should have had a crystal ball, but we
20 all do have the opinion now. So that's, I think, a very
21 significant development that the Court should take into
22 consideration in dismissing Count 2.

23 But then there's two more nuanced arguments. I'm
24 not sure if the Court wants to hear them, but I'd like to
25 make them quickly, if I can, and the first of all goes to

1 this idea of vertical relatedness. That is, they have
2 chosen in Count 2 to make this subsidiary, Wynn Mass., the
3 enterprise. Now, that's a mistake for what I'll get to in a
4 bit, but because they made the subsidiary, Wynn Mass., the
5 enterprise, that means a lot of these racketeering acts have
6 to be stricken anyway because a lot of these racketeering
7 acts predate the formation of the 2011 Wynn Mass.
8 subsidiary. So they've created a problem for themselves by,
9 in Count 2 anyway, calling Wynn Mass., the subsidiary, the
10 enterprise. And that leads to a separate problem which
11 makes Count 2 defective, and that's the so-called
12 distinctiveness issue, which I think we briefed quite a bit;
13 and that is that, in our view, under the post-Supreme Court
14 *Kushner Law*, there's those three Appellate Court decisions
15 which say you can't have the subsidiary be the enterprise
16 when the parent company is a RICO defendant. And those
17 three cases are from the Second Circuit, the Seventh
18 Circuit, and Fifth Circuit, and the pinpoint cites can be
19 found at Document 102 at the top, Page 6 of 15 on the
20 record. So those are the various reasons why we think
21 Count 2 should be thrown out; and as I said from the outset,
22 there are not two properly pled racketeering acts against
23 Mr. Wynn.

24 With respect to Counts 4 through 6 --

25 THE COURT: They do claim he --

1 MR. KELLY: I'm not going to address Counts 4
2 through 6, the state law --

3 THE COURT: All right, fine. Thank you.
4 Who's going to address these?

5 MR. STORCH: I'm going to try to talk up this
6 time, your Honor.

7 THE COURT: All right.

8 MR. STORCH: First, with respect to the Commission
9 allegedly knowing all the things that were withheld, there
10 are at least two things that are not on the chart. One your
11 Honor mentioned, the De Salvio side agreement with respect
12 to Mr. Gattinari, but also what was not known to the
13 Commission when they were doing investigation was that
14 Mr. Maddox, who was telling the Commission that he had no
15 idea who Mr. Lightbody was, had in fact met just a couple of
16 months earlier with Mr. Lightbody and was enlisting his
17 services to help with respect to both the application
18 process and acquiring property, so those were things that
19 were not disclosed.

20 Your Honor asked what weight --

21 THE COURT: Yes, what weight because would these
22 things -- given the Commission knew so much at that point,
23 the allegations of rape, the mob involvement, the whole
24 thing, and they still kept with the decision, even if this
25 is true, how do I know it would have been material to the

1 decision?

2 MR. STORCH: The decision back at the time of the
3 licensing, your Honor?

4 THE COURT: Or I guess the debate.

5 MR. STORCH: The original licensing?

6 THE COURT: Yes.

7 MR. STORCH: I think you can get that from the
8 decision itself. I mean, they make a statement that Wynn is
9 out, Kim Sinatra is out, Mark Shore is out, the director is
10 out; and they say there's no way, if these people were
11 there, they could be found suitable. So I think from there
12 you can see that the Commission, if these people had been
13 there and they had known this information, there would have
14 been a finding of unsuitability.

15 Also, you asked how much weight you should give to
16 the Commission finding that they were not misled. I submit
17 it's none because the Commission didn't find that. What the
18 Commission said was that they were extremely troubled by the
19 failure to come forward with the information. They said it
20 was difficult to fathom why it was not disclosed to them.
21 They talked about troublesome undercurrents because of the
22 nondisclosure. What they concluded was, they didn't have
23 enough evidence to show that it was a willful nondisclosure,
24 not that they weren't misled but that there wasn't
25 willfulness. And they pointed to a couple of instances,

1 your Honor, where I think it would be unfair to say, oh,
2 we're going to take the Commission's findings. In
3 particular, they focused in on Kim Sinatra. Kim Sinatra, as
4 we allege in the complaint, was the lead with Mr. Maddox
5 with respect to the FBT situation. She was the general
6 counsel. She had known Wynn. She had received information
7 about Mr. Wynn's past wrongdoings.

8 The Commission attempted to subpoena her to the
9 hearings. She refused to comply with the subpoena. They
10 asked her after the hearings were done if she would come and
11 she would clarify certain things; she refused to show up.
12 That's clearly evidence that would have been pertinent to
13 whether or not there was willfulness.

14 That proceeding as compared to here, your Honor,
15 if Ms. Sinatra in this proceeding refuses to obey a subpoena
16 and come and testify, I submit there are probably going to
17 be different ramifications of that. If she comes here and
18 takes the Fifth Amendment, there will be adverse inferences
19 that we would draw in this proceeding. So in that
20 proceeding, for whatever reason, the Commission clearly felt
21 it didn't or couldn't exercise power to command Ms. Sinatra
22 to come there and to explain why, in response to a specific
23 email asking her for disclosure, she didn't disclose it. So
24 the finding that we couldn't on this record find willfulness
25 is also hampered by what the Commission was able to compel.

1 I also note again, I noted it earlier, that
2 Mr. Maddox had surveillance going out on witnesses, and the
3 Commission expressed its concern about what effect that was
4 having on ongoing witness investigations. I submit in this
5 case, if anybody had gone and surveilled witnesses and led
6 those witnesses to be concerned, there would be a very
7 different result and a very different attitude towards that
8 and towards the fact-finding. So I think that's a reason
9 why the Commission decision is not binding, because all they
10 made was a determination that based on their record, they
11 could not discern willfulness. They were concerned enough
12 about how they had been misled, about how it was
13 unfathomable that they hadn't been disclosed this
14 information, that they imposed what we understand is the
15 largest fine ever in the casino business and imposed the
16 monitor.

17 The last point, your Honor, just on the second
18 enterprise, on the enterprise being the subsidiary, we
19 believe *Kushner* stands for the proposition that that is an
20 appropriate enterprise. The *Kushner* case was a situation
21 where you had a hundred percent shareholder, the person who
22 controlled the company, that was the person, and the
23 enterprise was the hundred percent owned corporation. The
24 cases that they cited in their replies, two of them don't
25 even deal with *Kushner*. It's not even clear that they were

1 aware at that point that *Kushner* had been decided. And the
2 other one goes on to say that if the subsidiary is being
3 used as an instrument to promote the fraud, then, under
4 *Kushner*, that would be an appropriate enterprise. And what
5 we allege right here is that Wynn MA was in fact --

6 THE COURT: What do you do with continuity on Wynn
7 MA once the employees or the officers who are the most
8 troubling have been fired? How do we get to continuity? I
9 understand the concern about continuity if these people
10 hadn't been fired. In other words, there's a line of cases
11 which is single- purpose, a single-purpose RICO conspiracy
12 generally isn't enough unless there's some threat of
13 continuity. Now, if these folks were still there, I think
14 you'd win this as a slam dunk, but they're not there. So
15 with respect to this -- or even with respect to FBT because
16 that's over with, right, how do we get the continuity piece?
17 That's what I'm struggling with, and maybe the Commission
18 was too because they imposed a monitor, but the real people
19 you'd be worried about have left.

20 MR. STORCH: Right, and we have cited cases, your
21 Honor, for the proposition that the defendants don't get off
22 because they've been caught. Now, there are cases that say,
23 look, if a defendant has been arrested and it stopped the
24 enterprise, that doesn't mean that continuity is not there.
25 The only reason that this came out before the Commission was

1 because of a Wall Street Journal article. The first
2 reaction of this company, including Mr. Maddox -- in fact,
3 Mr. Maddox was prominent in it -- was to attack the victims.
4 That was their first reaction. It was only after a very
5 well-documented Wall Street Journal article and then Nevada
6 picked it up that finally it got picked up by the
7 Massachusetts Commission. So to say, "Hey, look, continuity
8 shouldn't apply here because, look, now we've all been
9 thrown out because we're caught," that's not what the cases
10 say, your Honor.

11 THE COURT: I see. So you're just saying -- and I
12 suppose Mr. Maddox is still there.

13 MR. STORCH: Correct, correct.

14 THE COURT: Yes, that's a tough one. All right,
15 thank you. Is there one last argument?

16 MR. KRAMER: Thank you, your Honor. James Kramer
17 for Kim Sinatra. I'll keep it brief, your Honor. So the
18 claims against Ms. Sinatra, the former general counsel, are
19 that she knowingly lied, engaged in a RICO enterprise,
20 interfered with contractual relations, and engaged in unfair
21 business practices. But that's not what's pled. What's
22 pled is, she did a bad job on the license application. And
23 we've got to figure out, are we going with what's in the
24 complaint, or are we going with what's in the report that
25 came out last week? And we have to make a decision because

1 if we're going with what's in the complaint, your Honor,
2 there is nothing there. We in our brief made clear, there's
3 no allegation Ms. Sinatra knew that one of the people
4 involved was a felon. The only allegation is that she knew
5 someone had a, quote/unquote, "checkered past." As you saw
6 from Mr. Kelly's chart, that was all out there.

7 As it relates to Mr. Wynn, the only allegation is,
8 she was aware of a 2005 settlement that was brought to her
9 attention in 2012 by Ms. Wynn. And the allegation is,
10 Ms. Wynn said, "Hey, something happened in 2005. You were
11 not the general counsel. Someone else looked at it. Will
12 you take a look?"

13 THE COURT: I thought there were two alleged
14 rapes.

15 MR. KRAMER: The second one happened, your Honor,
16 in -- the alleged rape happened in 2014. And, again, this
17 is not in the complaint. So what I'm focused on is, are we
18 going to talk about what's in the complaint or what's not?
19 As to the 2014, I'll get to that right now. That's the
20 Abbott memo, and here's what happened: In 2013
21 Massachusetts passes on Phase 1 for Wynn. Subsequent to
22 that, subsequent to that, the Abbott memo comes out in July
23 of '14.

24 Now, the way Wynn Resorts was structured in the
25 day, you had the various properties. Each property, like

1 Las Vegas, had its own general counsel and own HR. Macau,
2 own general counsel, own HR. Ms. Sinatra was not the
3 general counsel of Wynn Las Vegas. She was not the general
4 counsel of Wynn Macau. She's the general counsel of the
5 holding company. What would happen is, reports of these
6 types of violations would go to the local GCs and the local
7 HR. They would only be brought to her attention if the
8 local general counsel raised this with her. All this is in
9 the Massachusetts report, your Honor. The structural part,
10 all this is in there.

11 THE COURT: So what are you urging me to look at,
12 the complaint or the report?

13 MR. KRAMER: Well, I don't know what you're going
14 to do. Your Honor, either way it's good for Ms. Sinatra --
15 and I will come to that in a minute -- but either way it's
16 good because here, what Massachusetts says is, look, the
17 local guy, Kevin Tourek, who was general counsel Las Vegas,
18 he got a memo, and that memo went to Mr. Wynn's private
19 lawyer, and Mr. Wynn's private lawyer sent it to
20 Ms. Sinatra. And Ms. Sinatra, respectfully, was not
21 properly subpoenaed. I represented her. They sent me a
22 note a day before the hearing saying, "Would you accept a
23 subpoena?" I said, "She's out of town." She was. She was
24 on the East Coast. And they said "Fine," and they let it
25 go. She was not subpoenaed --

1 THE COURT: She was what?

2 MR. KRAMER: She was on the East Coast. She was
3 here in Boston.

4 THE COURT: Oh, it was a subpoena from --

5 MR. KRAMER: They never sent a subpoena. They
6 sent me a note saying would she come out?

7 THE COURT: I'm just -- Nevada?

8 MR. KRAMER: I'm sorry. She was in Nevada on
9 family business with her children, and Massachusetts said,
10 "Would she be willing to voluntarily come out?" They did
11 not send me a subpoena, and we said "No". That's the short
12 version.

13 And, more importantly, she sat for three days. I
14 sat with her for three full days down the street from here,
15 full testimony, and they were done. They had plenty of
16 time. She fully cooperated, I promise you. And you know
17 what she hadn't --

18 THE COURT: -- on a motion to dismiss.

19 MR. KRAMER: I understand, your Honor, but you
20 were talking about -- I'm responding to the argument. My
21 point is, though, on the Abbott memo in '14, that came out
22 after all this. And the record in the report, if you choose
23 to listen to the report, is, there was a document she
24 received, and in the back of that document, if she had read
25 it carefully, she would have seen the sentence that says

1 "And I was raped." She never read that. That's what the
2 testimony was. None of the witnesses could say that she
3 read it. None of the witnesses could say they ever talked
4 with Ms. Sinatra about the rape allegation. And, by the
5 way, the case settled for \$9,000, and the person recanted,
6 so --

7 But going to the complaint, there is nothing in
8 the complaint except as it relates to the 2005 settlement,
9 which happened on someone else's watch, which Ms. Wynn
10 brought to
11 Ms. Sinatra's attention. Ms. Sinatra checked with everyone
12 involved. They said it was handled properly. And she asked
13 the specific question: "Do we need to make a further
14 disclosure?" Seven years later, "Do we have to make a
15 disclosure?" and was told "No."

16 THE COURT: By who?

17 MR. KRAMER: By the lawyers who were involved.
18 She talked to the top gaming lawyers in Nevada, a man named
19 Frank Schreck --

20 THE COURT: Oh, so out in Nevada?

21 MR. KRAMER: Yes, ma'am. And they said, "Was this
22 decision disclosed to anyone?" and was told "No."

23 But even if you were to consider the report, the
24 report itself says at Page 18 of the report, which I know
25 you haven't read yet, says it's not even clear this type of

1 stuff should have been disclosed. The questions weren't
2 drafted in a way. So, again, Ms. Sinatra is in a RICO case
3 for doing a bad job on a license. She's in a RICO case.
4 And, by the way, she wasn't fired. She left. She got her
5 full severance, full indemnity, and if you read the report,
6 you'll see all of that. If you read the press releases, you
7 will see all of that.

8 THE COURT: What weight would you say I should
9 give the report?

10 MR. KRAMER: Your Honor, I think that you
11 should --

12 THE COURT: This lawsuit in a way has been a bit
13 transformed, I mean, as of Friday.

14 MR. KRAMER: I think you go with what's in the
15 complaint. I think the plaintiffs have a burden to plead
16 specific facts under 9(b) to support --

17 THE COURT: So I should ignore the report?

18 MR. KRAMER: That's what I would say, but if
19 you're inclined --

20 THE COURT: I saw your colleagues --

21 MR. KRAMER: They can disagree, and that's fine.
22 I'm focused on Ms. Sinatra because there's nothing against
23 her. But I'm not afraid of the report. They put it at
24 issue, and if you read it, you're going to see that it would
25 have made no difference. The issues on causation are clear;

1 it would make no difference. But I do want to be clear,
2 your Honor. Ms. Sinatra is being called heads for fraud,
3 and if you look at the four corners of the complaint, it
4 barely mentioned her, right? On an interference with
5 contract claim, they don't even show that she was aware of a
6 relationship with Sterling. How could she interfere? They
7 don't show any improper conduct. She was filling out a
8 license for Wynn Resorts. We now know that whatever she
9 knew about the 2005 settlement did not need to be disclosed,
10 per Page 18 of the Massachusetts report, but yet she's being
11 held for that tort? Unfair business practices? If they
12 want her in the case, they've got to do better. That's
13 reality.

14 But, your Honor, the one thing I do want to
15 emphasize, and if you remember one thing from my argument
16 today, if you do read the report, please read the report --

17 THE COURT: Believe me, I'll read it.

18 MR. KRAMER: Okay, but don't go on what they say
19 in their Submission 115. They paraphrase supposedly is what
20 my sister said for years --

21 THE COURT: I'll read the whole report.

22 MR. KRAMER: Okay. But one of the things they try
23 to do is beef up Elaine Wynn, and they say that Ms. Wynn is
24 now the Board chair of Wynn Resorts and you should believe
25 her. Your Honor, she hasn't been on the Board for years and

1 years and years. She's not now. She got voted off when her
2 term expired, never got reelected, and is not on the Board
3 and is not the Board chair. But their letter 115 tells you
4 that. You can just look at the website.

5 My point is, people have been pretty fast and
6 loose up here with what people say and what the documents
7 say. If you carefully dispassionately say "Should Kim
8 Sinatra be in this case," you will reach one conclusion,
9 which is she should not.

10 THE COURT: Thank you.

11 MR. KRAMER: Thank you, your Honor.

12 THE COURT: At some point, I am struggling with
13 what weight to be given to this report. Do I build it into
14 the complaint? Do I take it as truth?

15 MS. BERNSTEIN: I --

16 THE COURT: No, no, I'm going to -- no.

17 MS. BERNSTEIN: We've got two. I think that what
18 has been said kind of covers both realms that we've tried to
19 cover, but the report has -- I'm not sure we have enough
20 information yet. I think the report is telling and can give
21 you something to think about because of the fact that there
22 was a decision to impose this punishment, and there's a lot
23 of information about wrongdoing and cover-ups related to the
24 sexual predation piece.

25 THE COURT: You submitted it, so you think I can

1 read it and take it into account?

2 MS. BERNSTEIN: Yes, right. I don't think it --

3 THE COURT: Is there anyone who doesn't agree with
4 that? You've all referenced it.

5 MR. KATZ: Your Honor, so I think it's a little
6 more nuanced, respectfully.

7 THE COURT: All right, well, it's her turn, so if
8 it's more nuanced, you'll have to come back to me.

9 MR. KATZ: If I can have two minutes after she's
10 finished.

11 MS. BERNSTEIN: The reason I say it's a little
12 incomplete, because it incorporates by reference the IEB
13 investigative report which came out in March of this year,
14 and we don't have all of the exhibits that were a part of
15 that or the exhibits that were appended to the decision that
16 was issued last week, and one critical one is Exhibit J at
17 that hearing, which is where Steve Wynn -- I'm sorry --
18 where they accept the bulk of the factual findings or all of
19 the factual findings as phrased -- it was talked about
20 differently at different points in the hearing -- that are
21 in the IEB investigation. And the IEB investigation is
22 incorporated by reference. I believe that somebody attached
23 that one. That's in the record too somewhere. So a lot of
24 those facts they conceded and agreed to.

25 So it is not just the decision. It is the IEB

1 report that contains facts, many of which were stipulated to
2 by the Wynn defendants. So obviously it could always be an
3 option to amend that was included in our submissions, and
4 there is much more that we now know, but there is still so
5 much we don't know. And, frankly, we should, we contend, be
6 given the opportunity to do discovery because we have fairly
7 pled the allegations in the complaint; and then there is
8 going to be a broader record for review at later more
9 appropriate stages of the case for decisions based on
10 sufficiency of evidence, et cetera.

11 As to Ms. Sinatra, and I'm sure Mr. Storch may
12 have some additional things specifically to say about the
13 RICO predicates, but she -- oh, one more thing about -- at
14 the hearing, she did -- it's true, she wasn't fired. She
15 was given a \$9.5 million severance, and she signed the
16 agreement for that severance on the day she was deposed by
17 the IEB. And the Commissioners at the IEB hearing said they
18 found it very interesting how little she could recall about
19 all of the things that they had -- one of the Commissioners
20 had a tally of twenty-seven times, or I don't remember what
21 the precise number was, but she made a point of saying there
22 were quite a number of things that she could not recall when
23 she went through her deposition as a part of their
24 investigation. So there's a whole lot more to this that we,
25 frankly, believe our clients should be entitled to develop

1 because there is a lot that was not disclosed to the
2 Commission in the process.

3 And as to what Ms. Sinatra knew, she is a Wynn
4 defendant. Wherever the allegations say "Wynn defendants,"
5 she is included in those allegations. And although she
6 claimed not to know about the FBT true ownership issues
7 before they were brought to her attention and she claimed to
8 be surprised, I think there are inferences that can be drawn
9 that that's subject to some question, and a fact-finder
10 could choose to disbelieve a statement, a self-serving
11 statement of that sort.

12 THE COURT: Well, you have to make a decision
13 because it's your complaint that's being evaluated. Do you
14 want me to consider the Commission report or not? Do you
15 want to let me know?

16 MS. BERNSTEIN: I think that I would feel more
17 comfortable. I think that that is an appropriate for a
18 follow-on letter or something to the Court about our views
19 on that.

20 THE COURT: Now, arguably I could take judicial
21 notice of it, arguably, but I don't have a clear message
22 from them either, so --

23 MR. KELLY: I think we do want you to consider it,
24 and in fact I think the letter on May 2 from plaintiff's
25 counsel said that providing you with a copy, some or all of

1 which may be subject to judicial notice, so that may be to
2 the extent appropriate because it's part of the record on
3 the pending motion, so I think it's critical because as I
4 pointed out --

5 THE COURT: So you're content?

6 MR. KELLY: Yes, please.

7 MR. BIAGETTI: So less nuanced. Wynn Mass., Wynn
8 Resorts, and Mr. Maddox all welcome your review of the
9 report for the causation reasons I talked about before, and
10 because they specifically address the failure to
11 intentionally mislead by either Wynn Mass. as applicant or
12 Mr. Maddox.

13 MR. KATZ: The reason I think it's just a touch
14 more nuanced, Judge, is because there was the Mass. Gaming
15 Commission decision back in 2014 as well which did speak to
16 FBT's members, including my client in the criminal case,
17 Mr. DeNunzio. I don't think you need to look at necessarily
18 what facts the Commission reached or found and say, oh,
19 that's conclusive on fact-finding, because in 2014 they
20 found that my client had intentionally fraudulently
21 backdated documents. We contested that point in the federal
22 criminal case. Mr. DeNunzio does not concede and we do not think
23 it's --

24 THE COURT: Right, but I'm only doing at the
25 pleading stage right now.

1 MR. KATZ: Correct, correct. But I think where
2 it's even more critical, though, Judge, that you should
3 consider both of these decisions, the 2014 which dealt with
4 the FBT ownership issue and this new one last week which
5 deals with the sexual predation issues, which FBT had
6 nothing to do with, of course, is that they demonstrate that
7 there is a state administrative agency --

8 THE COURT: Can I say that I'm not going to go on
9 that grounds. It says RICO. It doesn't say there's an
10 exhaustion requirement or whatever.

11 MR. KATZ: And I'm not arguing exhaustion, but I
12 think it shows why there's not a single case where a state
13 licensing decision has been the basis for a federal criminal
14 case, either under the Travel Act or the wire fraud statute,
15 at least one that succeeded, or RICO.

16 THE COURT: I don't know. If there are enough
17 adequate allegations of fraud, fraudulent predicates, and it
18 hits the pattern stage, I don't know that a Gaming
19 Commission decision one way or another wipes out the cause
20 of action.

21 MR. KATZ: No, but I think what it does
22 demonstrate, your Honor, is that these are exactly why you
23 shouldn't read the Travel Act and RICO to encompass as a
24 predicate act this stuff because there is a Gaming
25 Commission and an IEB that's looking at this.

1 THE COURT: I don't know that I agree with that,
2 but, anyway, did you want to just finish?

3 MR. STORCH: On this point, if I may just --

4 THE COURT: And then Mr. Kelly, and then we're
5 done.

6 MR. STORCH: Your Honor, we also welcome your
7 Honor reviewing that decision. I think that's just part of
8 the issue. The real question I think, as your Honor raised,
9 is what import does that have? And we would sort of like an
10 opportunity just to address that, since that is something
11 new that's come up.

12 THE COURT: I'm here. And can I say, I know no
13 one has any sympathy for me, but do you know how long it
14 took me just to read everything that was submitted, just
15 reading it? Not to mention what my poor law clerk went
16 through trying to look up all the cases. I don't want
17 another round of briefs and oppositions and replies and
18 surreplies. I think that is not in all of our interests.
19 So unless there's a case from the State Court or a
20 supplemental report from the Gaming Commission, I don't know
21 that I want another round of briefing.

22 MR. STORCH: Your Honor, if I may just --

23 THE COURT: You can talk right now about it, yes.

24 MR. STORCH: We do not believe that's binding on
25 us. We do not believe there is any collateral estoppel, any

1 binding on us over the findings. We believe it's pertinent
2 to the issue of this continuity and showing that there is
3 this danger of continuation. If we had had that report,
4 frankly, before we filed the amended complaint, we would
5 have put those allegations into the amended complaint. So I
6 think that that report could be read in conjunction with our
7 complaint to show that we're not talking about, as counsel
8 said, a one-off and the situation is closed. It's far from
9 that. This didn't end in 2014. It's still ongoing, and now
10 we have a monitor. So that's how I would ask the weight
11 your Honor to give it.

12 THE COURT: Yes, it's a public report, it's a
13 public fact-finding, and I forget the rule of evidence it's
14 under, but it's usually a hearsay exclusion if there's a
15 fact-finding. I haven't read it yet, but I'm assuming -- I
16 mean, there's at least one judge on there, right, so there's
17 a fact-finding. But I'll read it.

18 MR. STORCH: Thank you, your Honor.

19 THE COURT: I'll take judicial notice of it.

20 MR. KELLY: Just briefly, your Honor, I think if
21 they had this report at the time they were considering their
22 lawsuit, they wouldn't have brought it because, again, at
23 the top of Page 18 it says, "None of the applications --"
24 none -- "contained any questions that specifically required
25 the disclosure of information related to the allegations,

1 settlements, or other evidence of wrongdoing at issue here."
2 So, you know, if the Commission is pointing out that they
3 weren't lied to, that should end the issue here. The fact
4 that sexual harassment claims are serious and troublesome
5 doesn't mean they're RICO predicates. And what they've
6 alleged here is all these lies, and the Commission itself
7 says, "We weren't lied to." And the Massachusetts state law
8 statute does in fact require willfulness for there to be a
9 false statement; and if there are no underlying state law
10 violations, then the Travel Act doesn't come into effect.

11 Thank you.

12 THE COURT: Thank you.

13 MR. BIAGETTI: Your Honor, I just, if I may, I
14 just have --

15 THE COURT: You want the last word, as they say?

16 MR. BIAGETTI: Only with regard to Mr. Maddox
17 because I represent him as well, and I just wanted to remind
18 the Court -- obviously we briefed it separately -- but the
19 claims with regard to Mr. Maddox's role also fail for the
20 separate reason of Rule 9(b) particularity. And I call your
21 attention only to Paragraph 10 and 36 through 38 of the
22 complaint. Those are the places where plaintiff names those
23 senior officials who allegedly participated in all this
24 concealment and cover-up, and in every single situation they
25 name people by name, and Mr. Maddox conspicuously is

1 excluded in each of those. All the rest is impermissible
2 lumping and alleging that he knew things by virtue of his
3 status, which do not meet the standard for particularity.

4 THE COURT: Thank you to everyone. Two things:
5 I'm taking this under advisement, and I'm staying discovery
6 till I sort it out. So thank you.

7 THE CLERK: All rise.

8 (Adjourned, 12:29 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court
Reporter, do hereby certify that the foregoing transcript,
Pages 1 through 102 inclusive, was recorded by me
stenographically at the time and place aforesaid in Civil
Action No. 18-11963-PBS, Sterling Suffolk Racecourse, LLC v.
Wynn Resorts, Ltd., et al, and thereafter by me reduced to
typewriting and is a true and accurate record of the
proceedings.

Dated this 23rd day of May, 2019.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER